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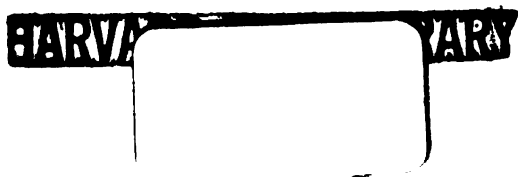
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COWEN'S REPORTS.

• **VOLUME NINTH.**



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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT;
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
OF THE
STATE OF NEW YORK.

BY ESEK COWEN,
COUNSELLOR AT LAW.

VOLUME IX.

THIRD EDITION.

WITH NOTES AND REFERENCES
BY ROBERT JOHNSTONE,
COUNSELLOR AT LAW.

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JUDGES
OF THE
SUPREME COURT

OF THE
STATE OF NEW YORK,
DURING THE PERIOD OF THESE REPORTS.

JOHN SAVAGE, *Chief Justice.*
JACOB SUTHERLAND, } *Justices.*
JOHN WOODWORTH, }

CIRCUIT JUDGES.

FIRST CIRCUIT.
OGDEN EDWARDS.

SECOND CIRCUIT.
JAMES EMOTT,

THIRD CIRCUIT.
WILLIAM A. DUER.

FOURTH CIRCUIT.
EZEK COWEN.*

FIFTH CIRCUIT.
NATHAN WILLIAMS.

SIXTH CIRCUIT.
SAMUEL NELSON.

SEVENTH CIRCUIT.
ENOS T. THROOP.

EIGHTH CIRCUIT.
JOHN BIRDSALL.

SAMUEL A. TALCOTT, *Attorney-General.*

* EZEK COWEN, reporter of the Supreme Court and of the Court of Errors, was appointed judge of the fourth circuit on the 19th day of April, 1828, in the place of the Hon. REUBEN HYDE WALWORTH, promoted to the office of chancellor of the state.

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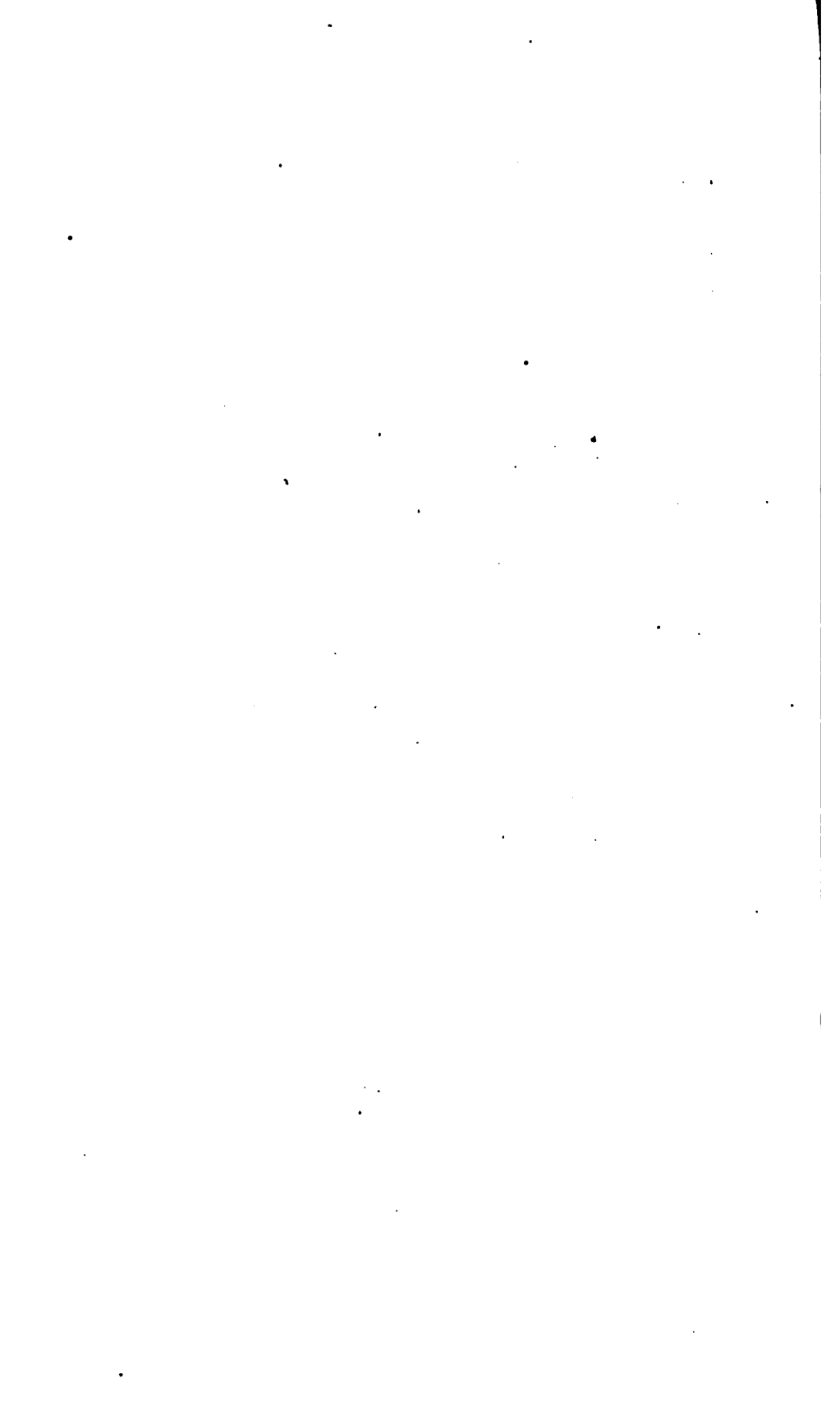
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK,

IN MAY TERM, 1828, IN THE FIFTY-SECOND YEAR OF OUR INDEPENDENCE

JACKSON, *ex dem.* GLOVER, *against* WINSLOW.

EJECTMENT for part of lot No. 68, in the town of Preble, in the county of Cortland: tried at the circuit in that county, January 3rd, 1827, before NELSON, C. Judge.

At the trial, the plaintiff proved that Samuel Crarath died seised of the premises in question between 15 and 20 years before.

He then produced a record in partition in the C. P. of Cortland, of the premises in question, between the heirs of Samuel Crarath, filed March 19th, 1819, by which it appeared that the commissioners of partition reported that the

Possession of land is *prima facie* evidence of seisin.

A quit claim deed, or deed without warranty, by one having no title at the time will not operate to carry a title subsequently acquired by the grantor. Otherwise of a deed with warranty.

A judgment debtor holding a deed of lands is seised as to his creditor, though his deed be not recorded pursuant to the statute. Hence, a conveyance or mortgage, *bona fide*, by him, intermediate the judgment and a sale on a *f. fs.* will not defeat the latter sale; for this relates to the time of docketing the judgment.

A grantee, assuming the payment of a debt due from his grantor, is a sufficient consideration to make a purchase of mortgage of land valid within the registry acts, as against an unrecorded deed.

Appended, however, that actual notice will supply the place of registry, and that notice to the agent is notice to the principal.

NEW YORK, lands could not be divided, and that they were ordered to
May, 1828. be sold.

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*The plaintiff farther proved, that on the 26th of March, 1819, the commissioners conveyed the premises in question to Obed Crarath, who, on the 19th of September, 1820, conveyed to Jared Parsons in fee, who on the same day, mortgaged them to the lessor of the plaintiff, to secure the payment of \$539,23. The deed to Jared Parsons was delivered to W. M. Allen. This deed and the subsequent mortgage were acknowledged and recorded the day of their date.

The defendant proved a judgment in the supreme court in favor of W. J. & A. Marvin against Noah Parsons, for \$3015,25, perfected November 15th, 1817; a *fi. fa.* and sale of the premises in question upon the judgment to the Marvins, by deed in fee from the sheriff, dated January 16th, 1824; and a deed in fee from them to the defendant of the same premises, dated August 1st, 1825.

It farther appeared that, Obed Crarath, on the 1st of June, 1816, pursuant to a previous bond for a deed of the premises in question from him to Noah Parsons, conveyed in fee to the latter, for the consideration of his note of \$67 at a year, which was paid when due.

On the 9th of July, 1818, Obed Crarath took back the deed from him to Noah Parsons. The deed was so taken back as security to Crarath against a note which he had signed with Noah Parsons to one Tallman. The deed was afterwards destroyed.

The deed from Obed Crarath to Jared Parsons was given at the instance of W. M. Allen, who informed Crarath that Jared Parsons had the bond for a deed which Crarath had given to Noah Parsons. The bond had not been given up when the first deed was executed.

A few days after executing the second deed the bond was given to Crarath. Allen did not inform Crarath he was agent for Jared Parsons.

Noah Parsons became insolvent in 1818 or 1819. The agent of Glover (the lessor of the plaintiff) requested one Mason to become obligated to Tallman for the note which

Crarath signed with Noah Parsons ; and Mason paid the note, which was \$500. Allen now held this note.

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*It further appeared that one Kellogg, previous to the note being taken up, came to Allen, in behalf of Glover, (the lessor of the plaintiff,) and wished to get Crarath's name off the note ; and said if that could be done, Crarath would give a deed to Jared Parsons, and he to Glover. Kellogg's object was, to secure a debt due to Glover, (the lessor of the plaintiff,) from Noah Parsons. It was understood that Jared Parsons had bid off the premises on an execution from Noah Parsons, but that Crarath had a title to them. It was considered that the note to Tallman was an incumbrance on the premises ; and if Kellogg could take up the note, Glover (the lessor of the plaintiff) was to have a mortgage from Jared Parsons for the amount of his debt against Noah Parsons. Allen, who drew the second deed, testified that Jared Parsons was not present at the time ; and that he, the witness, did not communicate to him the fact that there was another deed, until after the execution and delivery of the mortgage. When he made the communication, Kellogg was not present.

Kellogg testified that on the 27th of June, 1818, Noah Parsons became indebted to Glover, (the lessor of the plaintiff,) in \$481 66 ; that he came to Courtland county as the agent of Glover, to secure his demand ; Noah Parsons agreed to secure it, and informed him that Jared Parsons owned the property in consequence of a purchase made at sheriff's sale ; that Crarath had not conveyed the property to Jared, because he was liable on the note to Tallman, but that he would convey it on being indemnified against the note ; Kellogg procured Mason to secure this note, and Allen then discharged Crarath from it ; whereupon Crarath executed the second deed to Jared Parsons, and he executed the mortgage to Glover, (the lessor of the plaintiff,) that Noah Parsons never informed him (Kellogg) that Crarath had given a deed to Noah Parsons, nor did Kellogg know of that deed, until the mortgage was given and recorded, but he understood the premises were paid for by Noah Parsons, and had been sold on the oldest judgment

NEW YORK, against him; Kellogg did not know of the judgment of the
 May, 1828. Marvin's.

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The defendant gave in evidence a judgment of the Court-land C. P. in favor of one Clark against Noah Parsons, for \$1106 79, perfected September 15th, 1819, and a sheriff's deed of the premises in question under a *fi. fa.* upon that judgment, to Jared Parsons.

Verdict for the plaintiff, subject to the opinion of the supreme court, on a case containing the above facts.

D. Cady for the plaintiff. The deed of 1816, from Obed Crarath to Noah Parsons, was never recorded; and must therefore, be deemed fraudulent and void as to the lessor of the plaintiff, who is a *bona fide* purchaser. No actual personal notice can be pretended; nor was there any notice to his mortgagor.

But suppose, for the sake of the argument, that the lessor of the plaintiff and his mortgagor acted with full notice; Obed Crarath, when he gave the deed to Noah Parsons, had no title; and the title which he afterwards acquired did not enure to the benefit of Noah Parsons, his grantee. The first title which Obed Crarath had was under the partition deed. The deed from him to N. Parsons contained no warranty of title; it must be taken to have been a mere quit-claim, and, as such, it is well settled, could never operate to carry a previous title.

Again: the deed to Noah Parsons was surrendered to the grantor, Obed Crarath; and though this act would not pass back the title, yet it amounts to the same thing as to the grantee. He has voluntarily deprived himself of the evidence of title. The deed was voluntarily destroyed, and he shall not be permitted to set it up.

J. A. Spencer, contra. Though there was no registry or actual notice to the lessor of the plaintiff, or his mortgagor, of the deed to Noah Parsons, yet it is enough that there was constructive notice. This existed. Notice to the agent is notice to the principal. (*Jackson v. Sharp*, 9 John. 163.) Allen, the attorney employed by Kellogg to obtain

the second deed from Obed Crarath to Jared Parsons, knew, at the time he obtained it, that Crarath had before given a deed to Noah Parsons. This is notice, both to Jared Parsons and to the lessor of the plaintiff.

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Kellogg, the agent of the lessor of the plaintiff, had knowledge of circumstances enough to put him upon his enquiry as to Noah Parson's title to the premises. If he was ignorant of the fact that Noah Parsons had a deed from Crarath, it must have been because he was careful not to know it. He knew the premises had been paid for by Noah Parsons, and understood that they had been sold on the oldest execution against him. How should all this happen, if Noah Parsons had no title? He knew that Crarath was to give the deed to Jared Parsons, without receiving any equivalent, and that Jared Parsons should at once mortgage the premises, to secure Noah Parsons' debt. How could all this take place, unless Noah Parsons was really the owner? The note signed by Crarath, as the surety of Noah Parsons, to Tallman, was understood by Allen and Kellogg to be an incumbrance, and to get rid of this circumstance, they procured Mason as a substitute for Crarath. Was not all this sufficient to excite Kellogg's suspicion? to have opened his eyes, if he had not purposely winked so hard as not to see any difficulty in the way of securing Glover's demand? Allen does not swear that when he communicated the fact of the previous deed to Jared Parsons, which was after the mortgage given, that this was news to Jared. He had known of Noah Parsons' claim. He must have known it, for he had himself become the purchaser of his (N. P.'s) right at sheriff's sale.

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The fact that Obed Crarath purchased the premises in question from the commissioners in partition in 1819, does not prove that he had no title, or a defective one in 1816, — Whatever advantage Crarath derived under this purchase, enured to the benefit of Noah Parsons, his former guarantee.

Glover (the lessor of the plaintiff) is not a subsequent *bona fide* purchaser, or mortgagee for a valuable consideration, within the meaning of the 4th section of the act con-

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cerning deeds. (1 R. L. 370.) He gave no credit to any one. He created no new debt in consideration of taking the mortgage. He took it on an old debt, paying nothing whatever for the mortgage. It was no payment or extinguishment of the former debt; but merely a collateral security; and if not paid, Glover may prosecute Noah Parsons on the original consideration of the debt. (Cumming v. Hackley, 8 John. 202. Green v. Hart, 1 John. 580.) This mortgage is a mere security *of a pre-existing debt. (Jackson v. Willard, 4 John. 42, and cases there cited.)

Curia, per WOODWORTH, J. Here is no evidence that Obed Crarath, when he conveyed to Noah Parsons, in 1816, had any title. It stated that he gave a deed. This, of itself, is not sufficient to warrant a presumption of title: neither does the fact that Noah Parsons paid him a consideration, afford any additional support. These acts may have been performed under a belief that title was acquired, when in reality none passed. They fall short in making out, *prima facie*, competent evidence that Obed Crarath had any interest in the land. If we examine the rest of the testimony, the presumption appears to be strong that the title of the premises was acquired by the deed from the commissioners.

It appeared that Samuel Crarath died in possession; which is, *prima facie*, evidence of seisin. [1] Commissioners were appointed to make partition among his heirs: Who they were is not stated. It does not even appear from the case, that Obed Crarath, although of the same name, was an heir. For aught that appears, he may have been a stranger. It is enough, however, to say that the only evidence of title in him is derived from the commissioners' deed, executed in March, 1819.

It is argued by the counsel for the defendant, that this deed enured to the benefit of Crarath's guarantee in the

[1] *Per* SAVAGE, Ch. J. in *Livingston v. The Peru Iron Co.* 9 Wen. 520, 1. Bell v. The Commonwealth, 1 J. J. Marsh 550. *Per* LOAN, Ch. J. of Ireland, 3 Ridgw. P. C. 291, N. Ricard v. Williams, 7 Wheat. 59. Cook v. Wilson's adm'rs, Lit. Sel. Cas. 469. 1 Dom. B. S., tit. 3, § 4, Art. 1.

deed of 1816. Here also another difficulty lies in the defendant's way. We are left entirely in the dark, whether this deed was a mere quit-claim, or contained a covenant of warranty. It may have been either. The defendant, therefore, has not disclosed matter sufficient upon which to raise either the technical doctrine of estoppel, or to make the conveyance enure to the benefit of Noah Parsons and his assigns.

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In *McCracken v. Wright*, (14 John. 194,) it was held that by a quit-claim deed no title not *in esse* at the time would pass : [1] though when there was a warranty, it would operate as an estoppel, for avoiding circuitry of action. The doctrine is laid down in Co. Lit. sec. 446, and p. 265, a. b., that by a release no right passeth but the right which the releaser hath at the time of the release made ; as if the son release to the disseisor the right which he hath or may have, without clause of warranty ; after the death of his father, the son may enter against his own release, because he had no right at all at the time of the release made, the right being at the time in the father. (*Jackson v. Hubble*, 1 Cowen, 616, S. P.)

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It follows, if this view be correct, that the second deed given by Obed Crarath may be set up by the grantee deriving title under it ; and that it cannot be urged in support of the supposed title of the grantee under the first deed, for the reason that the defendant has not shown affirmatively that there was a warranty. The question of estoppel, therefore, does not apply on the facts before us.

But if, for the sake of argument, it be conceded that the title passed by the deed of 1816, then, inasmuch as that deed

[1] *Pettereau v. Jackson*, 11 Wen. 110. *Dart v. Dart*, 7 Conn. 250. *Tooley v. Dibble*, 2 Hill 641. *Jackson v. Peck*, 4 Wen. 300. But if the grantor represents himself in the quit-claim as the owner of the premises, both he and those claiming under him will be estopped from alleging the contrary. *Per Chancellor*, in *Jackson v. Waldron*, 13 Wen. 189. But as the grantee holds adversely to the grantor, he is not estopped from denying that the grantor had any title in the premises conveyed, either at or previous to the deed ; *Averill v. Wilson*, 4 Barb. S. C. Rep. 180 ; or that the grantor was seized of such an estate in the premises as to entitle his wife to dower. *Sparrow v. Kingman* - *Comst.* 242. See further 4 Kent † 261. Note c.

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has never been recorded, is the plaintiff affected by notice ? There is certainly no express notice ; although, perhaps, in a proper case, the facts might be sufficient to put the party on inquiry. If there was notice, it was given to the agent. The lessor of the plaintiff does not appear to have been personally acquainted with the circumstances attending the giving of the mortgage, or the time it was given. Kellogg was the agent of the lessor of the plaintiff for the purpose of obtaining security for his debt against Noah Parsons. It was represented to him that the title was in Obed Crarath, that Noah Parsons had paid for the land, and held a bond for a deed, and that Jared Parsons was equitably entitled to the land by reason of a purchase made by him at a sheriff's sale under a judgment against Noah Parsons, entered in 1819. As to this purchase, it may be here observed that the title of Noah Parsons, if he had any, was subject to the lien of Marvin's judgment in 1817, and was afterwards transferred to them by the sheriff's deed, 1824. In truth, Jared Parsons, in 1820, when this arrangement took place for securing the debt of the lessor of the plaintiff, had no estate or title whatever, unless the commissioners' deed of 1819 to Obed Crarath operated so as to enure to the benefit of Noah Parsons, the grantee in the deed of 1816 ; and if it did so operate, then indeed Jared Parsons might have acquired a title liable to be *defeated by a sale under the Marvins' judgment, which subsequently took place. Upon the supposition that the first deed was rendered valid by the execution of the commissioners' deed to Obed Crarath, still it was an unrecorded deed ; and I perceive no objection in such a case to Jared Parsons or any other persons, for valuable consideration and without notice, accepting a conveyance from Noah Parsons, in whom upon this principle, the title was vested. But here it is evident the parties acted under a misapprehension of the state of this title, provided it be conceded that the commissioners' deed to Obed Crarath operated as a confirmation of the deed previously given to Noah Parsons ; for in that case Noah Parsons was the person to convey ; and had he executed the deed to Jared Parsons, and the latter executed

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the mortgage to the plaintiff, then this question would be presented: If a judgment be rendered against A., who, in judgment of law, is, at the time, seised by virtue of a conveyance not recorded, and afterwards the land is sold under the judgment, and a conveyance executed, can that title be defeated by a purchaser who obtains a deed from A. subsequent to the judgment, but before a sale under it? I think it cannot; because the sheriff's deed relates back to the time of the judgment; and the command of the *fi. fa.* is to cause the money to be made of the lands whereof the debtor was seised on the day of the rendition, or at any time afterwards. If this position be correct, then it follows that the purchaser under the judgment is not called on to make out notice of the first deed. The question does not arise.

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If, however, I am mistaken on this point, and the judgment creditor is exposed to the risk of being defeated by reason of a deed from the defendant in the judgment subsequent to its rendition, then the question of notice would become material. But here it cannot arise, because no deed was procured from Noah Parsons. As to him, his title remains as it was. He has done no act to divest it.

It seems to me, therefore, that the doctrine of notice may be laid out of the case. Admitting that the agents of the lessor of the plaintiff, when they procured a deed from Obed Crarath to Jared Parsons, and at the time he mortgaged, *knew that Crarath had given a deed previously to Noah Parsons, such knowledge would be immaterial on the following grounds: *first*, because if Crarath, in the first deed, merely released or quit-claimed when he had no title, which it appears he had not, then nothing passed; and the lessor of the plaintiff or Jared Parsons was justified in accepting a deed. They were not bound to notice a conveyance altogether inoperative. If, on the other hand, the first conveyance of Crarath was confirmed by the commissioners' deed to him, then the land became bound by Marvins' judgment; and Crarath had nothing to convey, whether there was notice or not.

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If this cause had turned on the point whether the mort-

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gave was made upon good and valuable consideration, I think there is no cause to question it on that ground. A debt against Noah Parsons, assumed by Jared Parsons, was undoubtedly a sufficient consideration.

The result of my opinion is, that, on the facts stated in the case, the plaintiff is entitled to judgment. My opinion rests on this ground: that Crarath having conveyed in 1816, and it not appearing that he then had any title, or that the deed was with warranty, nothing passed; and consequently there was nothing upon which the lien of the Marvin's judgment could attach; and that Crarath, after he obtained title by the commissioners' deed, was at liberty to convey that title to any purchaser or mortgagee for valuable consideration. The deed to Jared Parsons, and his mortgage to the lessor of the plaintiff, entitled him to recover.

But as it is more than probable that material facts are not before us; particularly as the attention of the parties does not appear to have been directed to the question whether Obed Crarath had any title in 1816, and what was the form of the deed or conveyance by him then executed, upon the ascertainment of which facts the cause may assume a different aspect, I think the ends of justice require that a new trial be granted, with costs to abide the event.

Rule accordingly.

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*CORWIN and CORWIN against DAVISON.

Precedent of a declaration for fraud in the sale of a

chattel, both as to form and substance. In declaring for a fraud in representing a machine, on sale of the patent right, as capable, if constructed and worked as described by the defendant, of performing a certain quantity of labor, and averring that though so constructed it would not perform the work; *Held*, that it is unnecessary to set forth the manner of the construction. The consideration of the sale need not be set forth particularly. It is enough to say a valuable consideration was paid, or that the plaintiff satisfied the defendant, without any thing more. It is enough to aver that the defendant defrauded the plaintiff, without showing the means he used.

In declaring for a fraud in the sale of a chattel, it is not necessary to set out either the contract or consideration. *Adjudged on special demurrer.*

ON demurrer to the declaration. The plaintiffs declared in case, "for that whereas the defendant, on, &c., at, &c.,

intending to deceive and defraud the said plaintiffs, did encourage them to purchase of him, the said defendant, the right and liberty of making, constructing, using and vending a certain flax and hemp dressing machine, within the counties of Orange and Rockland, &c., he, the said defendant, then and there professing to have full power and lawful authority in him vested, to make, use and vend in the United States of America, the said machine, and the right and liberty of making, constructing, using and vending the same; and then and there falsely and fraudulently affirmed, that the said machine, when constructed in manner by him particularly mentioned, would, with the assistance or help of two men, break 500 weight of flax or hemp in a day, and dress 200 weight of the same at the same time, and thereby caused and induced the said plaintiffs to purchase of him, the said defendant, the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said flax and hemp dressing machine, within the counties of Orange and Rockland. And the said plaintiffs, confiding in the said affirmation of the said defendant, purchased of him, the said defendant, for themselves, their heirs, executors, &c. the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said machine, within the counties of Orange and Rockland, &c. and satisfied him therefor. Whereas, in truth and in fact, at the time of the affirmation and sale aforesaid, to wit, at &c. the said flax and hemp dressing machine, when constructed in the manner by him particularly mentioned, would not with the assistance or help of two men, break 500 weight of flax or hemp in a day, and dress 200 weight of the same at the same time; but on the contrary thereof, the said machine, when constructed in manner by him, the said defendant, mentioned, was altogether useless, and the defendant then and there well knew the same. By reason of which false and fraudulent assertion and affirmation, the said defendant, on, &c., at &c. falsely and fraudulently deceived them, the said plaintiffs, on the aforesaid sale, and thereby the right and liberty of making, constructing, using, and vending to others to be

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used the said machine, became of no use or value to the said plaintiffs; and thereby the said plaintiffs were then and there, and have at all times since, been put to great charge and expense of their money, and to great loss and expense of their time in and about constructing said machine, and in and about the purchase as aforesaid of the right and liberty of making, constructing, using, and vending to others to be used the said machine, in the whole amount to a large sum of money, to wit, &c. \$700, to wit, at, &c."

"And whereas also the said plaintiffs, on, &c. at, &c. at the special instance and request of the said defendant, bargained with the said defendant to buy of him the said defendant, the exclusive right and liberty of making, constructing, using, and vending to others to be used within the counties of Orange and Rockland, in, &c. a certain other flax and hemp dressing machine, which he, the said defendant then and there professed to have full power and lawful authority in him vested as the patentee of the same, to make, use and vend in the United States, and for which the said plaintiffs were to pay a valuable consideration: And the said defendant, by then and there falsely and fraudulently warranting and representing the said machine, when constructed, to be capable, with the help or assistance of two men, to break 500 weight of flax or hemp in a day, and dress 200 weight of the same, at the same time, then and there sold to the said plaintiffs the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said flax and hemp dressing machine, within the counties of Orange and Rockland, in, &c. for a valuable consideration to him then and there paid by the said plaintiffs. Whereas, in truth and in fact, at the time of the said sale and warranty, and at all times afterwards, the said machine, when constructed, would not, with the assistance, &c." (negating substantially, as in the first count, the power of the machine, in the words of the warranty.) "But on the contrary thereof, the said machine, and the right and liberty of making, constructing, using, and vending to others to be used the said machine was

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altogether useless to the said plaintiffs, and has from thence hitherto so remained and continued. And the said plaintiffs in fact further say, that the said defendant by means of the premises, on, &c. at, &c. falsely and fraudulently deceived them, the said plaintiffs, on the sale of the right and liberty of making, using, and vending to others to be used, the said machine as aforesaid, whereby the same became of no use or value to the said plaintiffs; and thereby also, the said plaintiffs were then and there put to great expense, &c." (residue as in the first count, and concluding in damages \$700, in the whole.)

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Davidson.

Special demurrer, assigning for cause as to the first count,
1. That it does not state in what manner the defendant represented that the machine ought to be constructed in order to perform the quantity of labor represented.

2. The plaintiffs charge the defendant with representing that he had power to make, &c. and vend to others, &c. and the right and liberty of making, constructing, &c.; and that he thereby defrauded the plaintiffs; and the plaintiffs do not show whether they intend to charge the defendant with having such authority or not.

3. The plaintiffs do not show how much they paid the defendant.

4. The plaintiffs do not show how the defendant deceived and defrauded them, and in what particular, and by what ways and means they were put to great expense and trouble of time, labor, and money.

As to the second count, the demurrer assigned the following causes; 1. The plaintiffs do not set forth whether the defendant deceived them in representing that the machine would perform a certain quantity of labor, if constructed in a particular manner, or whether the defendant deceived them as to his right or power to sell, or upon which or what account he deceived them.

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2. They do not describe in what manner the defendant said they must construct the machine in order to perform the prescribed work.

3. They do not state how or for what purpose they were induced to incur their alleged expense of money

NEW YORK, and time, or to what purpose the time and money were
May, 1828. applied.

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Joinder in demurrer.

J. A. Collier, in support of the demurrer.

Jas. King, contra, relied on *Barney v. Dewey*, (13 John 224,) as in point to support the declaration.

Curia, per SAVAGE, Ch. J. It seems to me the declaration is good. It charges that the defendant represented that he had lawful authority to make, use, vend, &c. the machine; and falsely represented the quantity of labor which could be performed when it should be constructed in the manner specified. It cannot be material to state the particular construction: for it is averred that when so constructed, the machine was utterly worthless.

This is an action founded on fraud; not on the contract; and therefore, it is unnecessary to set out either the contract or the consideration.

In *Barney v. Dewey* (13 John. 224,) it was decided that in an action on the case, for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was afterwards evicted by the rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving from the plaintiff to the defendant, or the price paid, as that is only a matter relating to the liquidation of damages. The fraud in that case consisted in a false affirmation as to the title; in this, in a false affirmation as to the capacity of the machine to perform labor. The plaintiffs here make no question as to the defendant's title to make, use and vend the machine. That of course is admitted; and the defendant has no right to complain that he is not put to the proof of that fact.

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*None of the causes are well founded. The plaintiffs are therefore entitled to judgment on the demurrer. The defendant has leave to withdraw his demurrer and plead on payment of costs.

Rule accordingly.

NEW YORK,
MAY, 1828.SMITH *against* MUMFORD.

ON error from the Monroe C. P. The placita of the record in the C. P. was of the 4th Monday of March, 1827. Mumford declared against Smith in debt, for that whereas the plaintiff, on the 28th of February, 1827, before Moses Chapin, Esq. one of the justices of the peace of the county of Monroe, at, &c. by the judgment of the said M. C., justice of the peace as aforesaid, recovered against the said defendant, as well a certain debt of 50 dollars as also 93 cents, which was adjudged to him by the said M. C. justice as aforesaid, for the damages which he had sustained, as well on occasion of the detention of said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the docket of the said M. C., still remaining in the possession of the said M. C., more fully appears; which said judgment still remains in full force, strength and effect, not in any way reversed, vacated or satisfied; and the plaintiff hath not, as yet, sued out or obtained any execution of, or upon the aforesaid judgment so in form aforesaid recovered; whereby an action hath accrued, &c. Yet, &c. (usual breach in debt.)

Pleas, 1. That the plaintiff did not recover as he complained.

2. That it did not appear by any record or docket that the plaintiff recovered as well a certain debt of \$50, as also 93 cents, adjudged as well for damages as for costs.

Both these pleas concluded to the country.

*3. That at the time of the judgment rendered, the defendant resided in Monroe county, and during all that time had a family, &c. concluding with a verification.

Demurrer to the 3d plea and joinder.

At the trial of the issues of fact, the plaintiff proved by the justice that he recovered a judgment for 50 dollars debt, and 93 cents costs. The docket of the justice was produced, and was in these words: "William W. Mumford

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Precedent of a declaration in debt on a judgment in a justice's court.

It is sufficient to say the party recovered so much (a sum within the justice's jurisdiction) for such a cause, (being a matter within his jurisdiction,) without setting forth any of the previous proceedings.

The declaration on a justice's judgment averred a recovery for a debt and also 93 cents for the party's damages as well by reason of detaining the debt as for his costs, &c. Proof of \$50 debt and 93 cents, costs. *Held* no variance.

The terms used in the declaration imported costs only.

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Form of entry of judgment in a justice's docket.

An action lies on a justice's judgment immediately on its rendition, though execution be stayed by the statute

NEW YORK, May, 1828.	v. Archelaus G. Smith. Feb. 1827. Personally served Feb. 10th, 1827. Narr. Jud't before Selden.
Smith v. Mumford.	Jud't for plt'ff., \$50 93. Feb. 28, 1827. Debt \$50
	Costs 93
	50 93"

The defendant demurred to this evidence. The jury found for the plaintiff below, subject to judgment on the demurrer. Judgment for Mumford, the plaintiff below.

S. Boughton, for the plaintiff in error. The judgment, as proved by the justice and the docket, was for *costs*; not *damages and costs*, as averred in the declaration. Here is a variance.

The third plea is a good bar. An action on a judgment lay at the common law before execution; but even there it was discountenanced. (*Biddleston v. Whitel*, 1 Bl. Rep. 507. *Simpson v. Stone*, 2 id. 785.) There the debt was *unjustly detained*, in the words of the declaration, which is synonymous with *unlawfully detained*. But the statute, (sess. 47, ch. 238, § 14,) makes it lawful, under the circumstances disclosed in the plea, to detain the debt. No execution could issue short of 90 days. The legislature intended to give the debtor time, without the enormous expense of an immediate suit in the court of record. It makes the debt in nature of one presently due, but payable at a future day.

But the declaration is bad. It does not give the justice jurisdiction of the cause and person, and indeed shows that he rendered judgment for a sum beyond his jurisdiction. No plaint is shown to have been levied or suit commenced; no summoning, apprehending, appearance, confession or hearing of the defendant. (Com. Dig. Pleader, (E. 18,) and *the authorities there cited.) *Sollers v. Lawrence*, Willes, 416. *Ladbroke v. James*, id. 201. 1 Chit. Pl. 335. *Service v. Hermance*, 1 John. 92. *Peebles v. Kittle*, 2 id. 365. *Kilburn v. Woodworth*, 5 id. 41, and the cases there cited by the court. *Pawling v. Bird*, 13 id. 206, and the cases there cited. *Bowman v. Russ*, 6 Cowen, 236.)

The jurisdiction of the justice is limited to \$50. Here **NEW YORK,**
 is a recovery as debt, and damages of more. May 1828.

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F. Whittlesey, contra. The judgment was proved to have been rendered as set forth in the plaintiff's declaration; and there was no variance. (3 John. 429. 11 id. 166. 12 id. 296.) The minutes of the justice need not contain a full history of the cause. It is enough if the prominent facts appear. The demurrer admits not only these facts, but every inference that a jury might draw from them. As to the objection that the docket proves *costs* merely, not *damages*, we say the words *damages and costs* as here used in declaring, signify *costs* only. (10 Co. Rep. 115, and the cases there cited. *Fitch v. The People*, 16 John. 141.) The forms of judgment by confession on penal bonds in this court, confirm that view; and if correct, there is no variance.

The common law, it is admitted, allows debt on judgment immediately. The statute does not take away that right. (*Hale v. Angel*, 20 John. 342.)

As to the declaration, a *recuperavit* alone is sufficient, not only in declaring on judgment in courts of record, but inferior courts. (1 Wils. 316. Com. Dig. Pleader, (2 W. 12,) and cases there cited. 1 Chit. Pl. 354, 5, and cases there cited.)

If we are correct in the meaning of the words *damages and costs*, then the justice had jurisdiction of the amount.

Curia, per WOODWORTH, J. As to the declaration, enough is set out to give the court jurisdiction; provided the construction of the allegation touching the amount of the judgment is, that no more was recovered than 50 dollars besides *costs*. Justices of the peace have jurisdiction in such cases; and this concise mode of declaring is sufficient. [1] It is approved in a variety of cases. (1 Chit. Pl. 354. 1 Wils. 316. 1 John. 92. 2 id. 365.)

[1] *Stiles v. Stewart*, 12 Wen. 473. But in *Turner v. Roby*, 3 Compt. 192, it was decided that in pleading the judgments of inferior courts of limited and special jurisdiction—such as justice's courts—it is necessary to show that the court not only had jurisdiction of the subject matter in con-

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The demurrer to the third plea was well taken: for, notwithstanding the suspension of execution in certain cases for 90 days, the commencement of an action of debt on the judgment does not interfere with that prohibition. It is a common law right to sue on the judgment, which is not negatived by the statute.

The case of *Hale v. Angel*, (20 John. 342,) shows in what light this question is viewed. Under the 11th section of the 25 dollar act, (1 R. L. 387,) it is provided that if the execution be returned unsatisfied, the party recovering may bring an action of debt. The execution was not returned; and yet the court held that the action might be sustained as soon as the judgment was recovered.

As to the demurrer to evidence, I think it supported the declaration. The docket showed there was a judgment for \$50 debt and 93 cents costs. The allegation in the declaration for *his damages sustained as well as costs*, is in the usual form where costs only have accrued. So are the entries in the books of practice. In debt on bond for a penalty, the entry is in this manner, although costs only are given.

In *Fitch v. The People*, (16 John. 141,) this court gave an exposition of the statute where, after the trial of a traverse in a forcible entry and detainer, it is declared that the party convicted shall pay *costs and damages* as shall be awarded by the justice. It was held that the words *damages and costs* were to be construed as applicable to costs only.

[1] In this case it was enough for the plaintiff below that *damages*, as distinct from *costs*, were not necessarily comprehended within the allegation in the declaration. *Costs* in many cases are considered as *damages*. In order to support the proceedings, the court will consider them as such, and that the allegation applies to costs merely, unless the party taking the objection shows that in fact the word *damages* had reference to a recovery of such *damages* distinct

trovery, but that it also acquired jurisdiction of the person of the defendant.

[1] As to the distinction between *damages* and *costs*, see *Griffin v. Mortimer*, 8 Wen. 540.

from the costs. Had that appeared, then indeed there would have been an excess of jurisdiction.

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Koon.

In point of fact, it appears that the 93 cents were costs only. That, however, cannot aid the plaintiff below. This point turns on the construction to be given to the words *costs and damages*, which, without further explanation, I think ought to be considered as applicable to costs only.

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The judgment of the court below must be affirmed.

Judgment affirmed.

Bullock against Koon.

SLANDER, tried at the Rensselaer circuit, when a verdict was found for the plaintiff on a case which is sufficiently stated in the opinion of the court.

The case was argued by

J. P. Oushman and A. Van Vechten, for the motion, and

H. P. Hunt and D. Buel, contra.

Curia, per SAVAGE, Ch. J. This is an action of slander for charging the plaintiff with swearing to a lie before arbitrators. The facts are, that while the plaintiff was giving testimony as a witness before arbitrators, the defendant charged him with swearing to a damned lie. On the trial at the circuit, the plaintiff proved by parol the fact of arbitration and the terms of the submission. He then proved the testimony given by him as a witness. It appeared that the submission was in writing, by bonds entered into by the parties. The defendant's counsel objected that the bonds were higher evidence, and ought to have been produced. The judge decided that the parol evidence should be received, subject to the opinion of this

In slander, where the words are not actionable in themselves, but become so by extrinsic circumstances, these must be averred and proved.

The best evidence must be produced; and where the charge was of swearing false before arbitrators, and the submission appeared to have been by bonds; *held*, that they must be produced, and the submission could not be shown by parol.

In such case, as on an indictment for perjury, enough must

be shown to give the court or magistrate administering the oath jurisdiction. Enough must be proved, also, to show the materiality of the testimony.

Before arbitrators, or on the trial of a cause, one oath to a witness is enough, though he be examined on different matters and at different times: and, though the time for the award (in case of arbitration) be enlarged after he is sworn, yet he may be examined on his first oath after the enlargement.

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court. In the progress of the trial, it appeared that the arbitrators had two meetings; that the plaintiff was examined at the first meeting; that before the second meeting, the time of the submission had been enlarged; and *that at the second meeting, the plaintiff was cross-examined, without being sworn a second time; and it is contended, therefore, that although he may have sworn falsely at the last meeting, (when the charge was made,) such false swearing would not be perjury, and, of course, to charge him with such false swearing, cannot be actionable. The defendant also contends, that the charge was made as to an immaterial answer to an immaterial question, and, therefore, the verdict is against law.

The first question is the only important one.

When words are actionable in themselves, the plaintiff is not under the necessity of proving any thing but the speaking of the words charged in the declaration. [1] If, however, the words spoken are not actionable in themselves, but become so by the circumstances under which they were spoken, those circumstances must be averred in the declaration and proved on the trial. [2] In this case, the fact of the arbitration, the submission, the swearing of the plaintiff by a justice of the peace, and the materiality of the testimony given by the plaintiff, are no doubt averred in the declaration. I infer this from the case, though it is not expressly stated. Without the concurrence of all these circumstances, the plaintiff could not have committed perjury; and the words are actionable only because they import a charge of perjury. In order, therefore, to subject the defendant to damages for having charged the plaintiff with being guilty of perjury, the plaintiff must show that the charge, from the circumstances under which it was

[1] Coons v. Robinson, 3 Barb. S. C. Rep. 625. Crawford v. Wilson, 4 Barb. S. C. Rep. 504. Case v. Buckley, 15 Wen. 327. Demarest v. Haring, 6 Cow. 76.

For a reference to most of the leading English and American cases as to what words are and are not actionable *per se*, vide M'Cuen, ads. Ludlem, 1 Harris, N. J. Rep. 12; and Billings v. Wing, 7. Verm. Rep. 437.

[2] Milligan v. Thorn, 6 Wen. 413. Hawks v. Hawkey, 8 East, 431. See also 12 Wen. 500. 3 Denio, 346. 1 id. 211. 1 Const. 177.

made, did amount to a charge of perjury. This the plaintiff was sensible of at the trial, and introduced proof of all those circumstances. An objection was made to the *quality* of that proof. Upon the trial of an indictment for perjury alleged to have been committed on the trial of a cause, the record of such cause must be produced. So much of the evidence must be proved as to show its materiality, and such prefatory circumstances as are averred for the same purpose, must be also proved. (Stark. Ev. 1143.) Had the plaintiff been indicted for perjury committed in swearing to "the fact which defendant said was a lie, the public prosecutor must have set forth in his indictment, and proved all the facts and circumstances, to give jurisdiction to the arbitrators and authority to the justice to administer the oath; and further, he would be bound to show the materiality of the testimony. On such a trial, the prosecutor would be bound to produce the record of the former trial, that being the highest evidence. If there was no record, then the next highest evidence must be produced. The submission of the parties gives jurisdiction to the court, (the arbitrators,) and when the submission is in writing, that is better proof than oral testimony. Such would be the course on the trial of an indictment, and such, I apprehend, should have been the course of proceedings at the circuit. The rule is general, (and admits of very few exceptions,) that the best evidence must be produced. This principle is so familiar, that no authority need be cited. [1]

The exceptions stated by the plaintiff's counsel are in the case of slander of an attorney and of a clergyman. *Barryman v. Wise*, (4 T. R. 366,) was slander by an attorney for charges against him as such attorney. It was objected at the trial, that the fact of his being an attorney should be proved by the roll of attorneys. The objection was overruled. On a motion by the defendant to set aside the verdict, and for a nonsuit to be entered, Buller, Justice, said, that in the case of all peace officers, justices of the peace, constables,

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[1] The opinion of the learned judge in this case, is commented on and explained in *Jacobs v. Fyler*, 3 Hill, 575.

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[*33]

&c. it was sufficient to prove that they acted in those characters, without producing their appointments. [1] And in the case of *Cummin v. Smith*, (2 Serg. & Rawle, 440,) the same rule was applied to a preacher of the gospel, where the defendant had said that the Rev. Thomas Smith was guilty of perjury. [2] Tilghman, chief justice, in giving the opinion of the court, says: The objection is, that Mr Smith's ordination should have been proved by the records of the church to which he belonged. This is certainly the best evidence; but the strictness of the rule is relaxed in cases where the defendant, by his actions or words, has avowed the fact which is to be proved. In both these cases, the defendant had, in making the charges, admitted the special character of the plaintiff. But those cases have no application here. The defendant, by charging the plaintiff with swearing false, has not admitted any of those concomitant circumstances which render false swearing perjury. The case of *Green v. Long*, (2 Caines, 91,) supports the doctrine which I assume as correct. There, the defendant had charged the plaintiff with perjury in terms. By the notice attached to the plea, the defendant stated the perjury was committed before a court martial. At the circuit, the plaintiff was nonsuited for not producing the proceedings of the court martial, which the defendant relied on in justification: but the learned judge stopped the plaintiff's counsel upon the argument by saying he was clearly wrong at the circuit. It ought to have been presumed that every thing took place before a court of competent jurisdiction. The onus lay on the defendant to show that it was otherwise. Why? Because the charge there was, "You have perjured yourself." No allusion was made to any court at the time. The words were actionable in themselves, and all the plaintiff was bound to prove was the speaking of the words. The defendant, then, was bound to prove those circumstances which constituted false swearing before that special

[1] *Pearce v. Whale*, 5 Barn. & C. 38. *Snow v. Peacock*, 2 Carr. & P. 215, *Per Best*, Ch. J.

[2] *Goshen v. Stonington*, 4 Conn. 209. See also 1 Cowen & Hill's notes to Phil. Ev. p. 449, N. 280, 281.

tribunal, perjury. Not so here. The *onus* lies on the plaintiff here for a similar reason, that it lay on the defendant in that case.

I am of opinion, therefore, that a new trial must be granted.

There is no weight in either of the other points made by the defendant. The witness need be sworn but once on the trial of the same cause, though the matters in issue may be varied during the trial; and, as to the charge of falsehood being made to the question whether the witness had so testified on his first examination, that matter was settled by the verdict of the jury upon contradictory testimony, and, in my judgment, correctly.

New trial granted, with costs to abide the event.

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Wheeler

v.

Wheeler.

•WHEELER and WHEELER, executors of Wheeler, against
WHEELER.

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ON demurrer to the replication of the plaintiffs to the second and third pleas of the defendant.

The declaration was by the plaintiffs, as executors of S. Wheeler deceased, on a promissory note given by the defendant to the testator, dated September 5th, 1820, for \$260, with interest.

Plea, 2dly, that after the *capias* sued, and before declaring, S. B. Wheeler, one of the plaintiffs, released the note by deed of release under seal, dated January 30th, 1826.

3dly. That before the suing out of the *capias*, Nathan Wheeler, the other plaintiff, released.

pledge such note or assign it, as collateral security for a judgment obtained against the estate of his testator.

The assignee of a chose in action, who takes it as collateral security for a debt, has a power coupled with an interest, and will be protected as an assignee against the release of his assignor made after notice of the assignment to the debtor.

To constitute such an assignee of a chose in action as courts of law will protect against the acts of his assignor, the assignment need not be absolute, or of the whole subject matter. It is enough that it carry to the assignee a power coupled with an interest.

Executors are esteemed but one person in law; and acts done by one or several, relating to the delivery, sale or release of the testator's goods, are the acts of all.

Thus, one of two executors may assign a note belonging to the estate of their testator.

So he may

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Wheeler.

Replication to both pleas, that before the making of the releases in the pleas mentioned, viz. February 28th, 1825, S. B. Wheeler assigned the note declared upon to E. & S. P. Gilbert, as collateral security for a judgment obtained by the Gilberts in the supreme court, for \$338 58, on the 6th of December, 1823, against the estate of the testator; the money, when received on the note, to be applied as payment on the judgment. That this suit was commenced for the sole benefit of the Gilberts; and that the defendant had notice of the assignment on the day of its being made. General demurrer and joinder.

E. Williams, in support of the demurrer. It is not denied that this court will notice and protect the interests of an assignee or *cestui que trust*; but he must be the *cestui que trust* of the whole subject matter. (*Prescott v. Hull*, 17 John. 284.) One of the two executors could not dispose of the property in the note due to his testator in any other way than by collecting it, and applying the avails to the payment of a debt due from the estate. He has no power to assign for any special purpose. This was not, therefore, and could not be a sale or assignment of the note within the meaning of the cases. The act was void. But at most it is a mere pledge; and the court never have gone so far as to protect the mere mortgagee of a chose in action.

[*35]

A. Vanderpool, contra. The assignment to the Gilberts was valid. There cannot be a doubt that one of the executors had power to assign the note. The argument which would defeat the assignment would equally defeat the release. But the right is clear as to both. (*Bac. Abr. Executors and Administrators*, (D.) and the cases there cited.) The act of one executor is the act of both.

The assignees, then had an authority coupled with an interest. (*Canfield v. Monger*, 12 John. 346.) There cannot be any distinction between persons acting in their own right, and executors. The latter may compound or arrange debts due from their testator in any way, with the assets in

their hands. They may do everything necessary to effect the settlement of claim against them.

It follows that the release was void, as being after assignment and notice.

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v.
Wheeler.

Curia, per WOODWORTH, J. It appears to be well settled, that if a man appoint several executors, they are esteemed in law as but one person representing the testator; and that acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods, are deemed the acts of all. [1] Thus a term of years passes by the assignment of one; [2] and if one releases a debt, it is good, and binds the rest. [3] (Bac. Abr. Executors and Administrators, (D.) and the cases there cited.) It was therefore competent for the executor to assign the note; and such assignment was valid so far as respected the general power of the executor. If it cannot be supported, it must be for some other cause.

The note was assigned as a collateral security, for the purpose of being collected and applied to the satisfaction of the judgment. The Gilberts had an authority coupled with an interest, which the executor could not divest them of, without paying the judgment to which the note was to be applied. [4] (Canfield v. Monger, 12 John. 346.)

[* 36]

In *Prestcott v. Hull*, (17 John. 292,) the doctrine is laid down, that to defeat the attempt of the assignor to discharge the debt, it must be averred by the replication, that the debt was assigned for a full and valuable consideration,

[1] *Bogart v. Hertell*, 4 Hill, 492. *Murray v. Blatchford*, 1 Wen. 583. *Douglas v. Satterlee*, 11 John. 18. *Ex parte Rigby*, 15 Ves. 462.

[2] *Dyer*, 23, b. in *margine*, *Simpson v. Gutteridge*, 1 Madd. 618. See *Turner v. Halday*, 9 M. & W. 770.

[3] *Anon. Dyer*, 23, b. in *margine*, *Jacobus v. Hartwood*, 2 Ven. Sen. 267. Where an action was brought by two out of four executors, and the two executors who were not joined in the action, released the defendant, who pleaded the release *per litteras commissas*, the court of exchequer refused to set aside the plea, the plaintiffs having failed to make out a case of fraud. *Herbert et al. v. Pigott*, 2 Cr. & M. 384. S. C. 4 Tyr. 295.

[4] *Hunt v. Baummanier's administrators*, 8 Wheat. 174. *Mansfield v. Mansfield*, 6 Conn. 559.

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v.
Messenger.

and that the suit is prosecuted for the benefit of the assignee. I think this has been done. The replication expressly avers the latter fact; and as to the consideration, it was to secure and discharge the judgment as far as the note would produce that effect. It cannot be doubted that here is a good consideration to support the assignment. The Gilberts could not acquire an interest, if there was not a good consideration to rest on. The case of *Canfield v. Monger*, was this: A. delivered a note to B. to receive the amount and apply it to the payment of a note from A. to B. This was held to be an equitable assignment, and to vest an authority and interest in B.

If this view of the case be correct, the executor could not, by a subsequent release, affect the interest of the Gilberts. Such release, after the assignment and notice, was a nullity. (*Littlefield v. Story*, 3 John. 426.)

The demurrer to the replication is not well taken, and the plaintiff is, therefore, entitled to judgment.

Judgment for the plaintiff.

[*37]

*THE PRESIDENT, DIRECTORS AND CO. OF THE BANK OF
CATSKILL, *against* MESSENGER AND OTHERS.

An agreement or covenant not to sue one of several promissors, is no release of the others, though made upon good consideration.

Otherwise of a technical release.

No act of the creditor can affect the relation between several debtors, in respect to their rights and liabilities as between themselves.

CASE by consent. The plaintiffs declared on a note of \$5000, dated December 26th, 1816, made by six persons, three only of whom were taken or appeared.

The defence relied on was, that on the 16th of January, 1823, the plaintiffs made an agreement in writing with Reynolds, one of the makers, reciting that the balance then due on the note was \$1157 09. Of this Reynolds agreed, within two months to give security for \$500, payable in three years from the 9th of January, 1823; and the plaintiffs agreed that, on his so doing, no suit should be brought against him to affect his person or property; but a suit was to be brought against the other makers, for the joint benefit of the bank and Reynolds, according to their several

interests in the note. Reynolds gave the security pursuant to the contract, and the sheriff was directed not to arrest Reynolds on the *capias* in this suit.

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Messenger.

The defendants gave a *relicta* and *cognovit* for the balance due on the note, subject to the opinion of this court.

J. Powers, for the plaintiffs, cited 7 John. 207. Gow. on Partnership, 247, 249, 251; 4 M. & S. 427; 2 Rol. Ab. 409; 2 Show. 47; 4 B. Moore, 448; 8 T. R. 168; 1 Marsh. Rep. 607; 1 Ld. Ray. 690; 5 East, 232; and 2 John. 449.

J. A. Spencer, contra, cited 1 John. Ch. Rep. 404, 425; 2 id. 554; 4 id. 123, 545, 235; 16 John. Rep. 42; Bac. Abr. Release (A.) pl. 2; 2 Salk. 573; and 8 John. Rep. 58, 9.

Curia, per SAVAGE, Ch. J. The principle which governs this case has been settled in this court, as well as in the English courts. In the case of *Harrison v. Close & Wilcox*, (2 John. 448,) the action was brought on a note for \$71. The defendant Close gave Wilcox \$21 55, which he paid the plaintiff; and the plaintiff then agreed to collect the balance of Wilcox. Spencer, justice, who delivered the opinion of the court, says, an agreement, never to sue a sole debtor, made on a valid consideration, or a covenant not to sue, has been justly held to operate as a release, to avoid circuitry of action. [1] But where there are two obligors or promissors, a covenant not to sue one of them, so far from releasing the demand, has been repeatedly held not to protect the other obligor, and that then its operation is as a covenant. (2 Saund. 48, note *a* and cases there cited.) [2]

[*38

Rowley v. Stoddard impleaded with Stoddard, (7 John.

[1] *Jackson v. Stackhouse*, 1 Cow. 122. Per Marcy, J. in *Winans v. Huston*, 6 Wen. 474. *Chandler v. Herrick*, 19 John. 129.

[2] *Frink v. Green*, 5 Barb. S. C. Rep. 455. *Hoesack v. Rogers*, 8 Page, 229. S. C. 18 Wen. 319. *Hutton v. Evre*, 6 Taunt. 289: 1 Marsh. 603. *Dean v. Newhall*, 8 T. R. 168.

NEW YORK,
May, 1838.

Catskill Bank
v.

Managers.

207;) was an action on a judgment in Vermont; and by the record it appeared the judgment was rendered on a note signed by the two Stoddards for \$200. On the trial it appeared that an agent of the elder Stoddard settled with the plaintiff, and paid \$100 on account of the elder Stoddard only. The plaintiff gave him a receipt in full of all demands. It was agreed that the suit should proceed for the purpose of selling certain property which had been attached. The younger Stoddard then agreed to pay one half. Thompson, justice, delivered the opinion of the court, and says, it is a well settled rule, that a release to one of several obligors, whether bound jointly, or jointly and severally, discharges the others; but that a covenant not to sue one does not amount to a release. A technical release under seal is necessary to be given to one of several debtors, in order that the others may avail themselves of it as a discharge. [1]

These two decisions embrace the whole question now before us. The bank agree with Reynolds, not to sue him. They do not release him technically; nor do they technically covenant with him. The agreement, though in writing, is not under seal. They do enter into a written

[1] *De Long v. Bailey*, 9 Wen. 335. *Frink v. Green*, 5 Barb. S. C. Rep. 455. But where the release to one joint debtor is given with the consent of the other, it does not discharge the debt. *Rogers v. Hosack's ex'rs*, 18 Wen. 319. *Bank of Chenango v. Osgood*, 4 Wen. 607.

In New York, by an act passed in April, 1838, entitled "an act for the relief of partners and joint debtors," one partner may make a separate composition with the creditors of the partnership, after its dissolution, for which he must take a release in writing, nor will such compromise, and release, discharge the other partners; and this act extends equally to joint debtors. See Revised Statutes, 4th ed. 176, 177, § 23 to 29. But unless the release be absolute in its terms, and refers to this act, it will be construed with reference to the common law, and regarded as a discharge to all the joint covenantors. *Hoffman v. Dunlap*, 1 Barb. S. C. Rep. 198. *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 460.

Where the defendant and one M. N. gave the plaintiff their joint and several promissory note, to secure a separate debt due from each of them, the plaintiff afterwards executed a deed of release to M. N. Held, that although the release discharged both, it did not enure to the discharge of the separate debt of the defendant, but that the plaintiff might recover on an account stated. *Cocks v. Nash*, 4 M. & Scott, 162.

contract with him, that if he secures the payment of \$500, they will prosecute the other defendants, and in case of recovery, they will return to him his \$500. If they do not receive the whole, he is to receive his proportion. But all this is no defence to those who are sued. A technical release to one is a bar as to all others, because it is an admission by the creditor that his debt is paid. An agreement or covenant not to sue one of several joint debtors, contains no such admission, but the contrary. No injury is done to the defendants. If this is a case in which contribution should be made, the agreement in question cannot defeat it. It is not in the power of the creditor to alter the law between joint debtors. If the bank chooses to give the whole debt to one of the defendants, that is no concern of the defendants who are arrested, nor does it change the liability of the favored debtor.

The cases cited by the defendants' counsel in relation to sureties, have no bearing on this case. There is nothing in the case to show that any of these defendants are either principals or sureties, and if there was, there is no agreement to give time to the principal to the prejudice of the surety; nothing to prevent the substitution of the surety in the place of the creditor against the principal debtor. All the defendants are makers of the note, and for aught that appears, all equally interested.

Judgment for the plaintiffs.

AUSTIN against SAWYER.

TRESPASS quare clausum fregit, tried at the March circuit, 1827, in Orleans county, before Birdsall, C. Judge; when a verdict was taken for the plaintiff for 57 80, subject to the opinion of this court on a case containing facts which are sufficiently stated in that opinion.

And where A. quit-claimed land to W., on which a crop of wheat was growing, reserving the wheat by parol, both at the time of the quit-claim executed, and in a previous converse-

NEW YORK,
May, 1828.

Austin
v.
Sawyer

[39]

Parol evidence is not admissible to contradict, or substantially vary, a written contract.

["40]

NEW YORK,
May, 1828.

Beck & Hunt, for plaintiff.

Austin
v.
Sawyer.

Bronson, for defendant.

Curia, per SAVAGE, Ch. J. From the whole case the facts appear to be as follows: The plaintiff Austin, and one Orrin Wilcox, were in possession of farms in Orleans county, and each had sowed a crop of wheat on the farm by him occupied. After sowing, and in October, 1825, they agreed to exchange farms, each reserving his own crop of wheat. On the 13th of October, 1825, they executed quit-claim deeds containing no reservations whatever. Austin fenced the wheat, on the farm he had left, in the spring of 1826. Wilcox did the same as to the wheat he had sowed, and at harvest time he cut and carried it away. Wilcox did not take possession of the farm which he had of the plain-

tion, when it was agreed by the parties that it should be reserved, such reservation was held inadmissible to contradict the conveyance in writing, which carried the title of the wheat with the land.

W. sold and assigned his interest in the land to S. which, as S. claimed, carried the title of the wheat, still growing, to him; and he cut and carried it away. But before the sale or assignment to him, and (a witness thought) at the time, W. stated that the wheat belonged to A. Held, that A. might recover of S. the value of the wheat, on the ground that W.'s declarations were evidence of a sale to A. subsequent to the quit-claim.

Held, that A. might maintain trespass *quare clausum fregit*.

And note, that the declarations of W. a vendor, made before the sale, were received in evidence to affect the rights of his vendee, though the vendor was a competent witness for the plaintiff, which is contrary to, and seems to overrule one point that was held in *Hurd v. West*, (7 Cowen, 752.) [1]

Wheat is a mere chattel, and the property in it will therefore pass by parol and without writing, the statute of frauds not applying to such a case.

One sells his crop by parol, and afterwards conveys the land; this conveyance will not carry the title to the crop.

So if one should lease by parol for 3 years, and then convey by deed, this would not affect the lessee. Per SAVAGE, Ch. J., delivering the opinion of the court.

Whoever has an exclusive right to the soil, as to a crop of wheat growing thereon, may maintain trespass *quare clausum fregit*.

[1] This note, which is incorrectly reported, is corrected in *Whitiker v. Brown*, 8 Wen. 490. The rule of evidence laid down in *Hurd v. West*, 7 Cow. 952, that the declarations of the vendor of personal property, though before sale, are not evidence for the vendee, and the vendor must be called as a witness, is correct. 8 Wen. 490. *Bristol v. Dann*, 12 Wen. 142. *Kent v. Walton*, 7 Wen. 256. In *Beech v. West*, 1 Hill 612, the above rule was confirmed on the ground of *stare decisis*.

The propriety of the rule is doubted in 1 Cowen & Hill's Notes to Phil. Ev. 282, repudiated in *Shirley v. Todd*, 9 Greenl. 83. *Hatch v. Dennis*, 1 Fairf. 244. *Hale v. Smith*, 6 Greenl. 416, and practically denied in *Peabody v. Peters*, 5 Pick. 2. *Sergeant v. Southgate*, id. 83. See also per Lord Denman, in *Phillips v. Cole*, 10 Adol. & E. 106, and the observations of Mr. Dana, 9 Dana Ab. 301.

some time after contracted to assign his interest in to the defendant. Wilcox then stated to the defendant, that the wheat was reserved, and belonged to Austin the plaintiff. Some time elapsed after this parol agreement, before the assignment was in fact executed. The conveyance to Wilcox was without seal, and so was the assignment, which was as follows: "In consideration of one hundred and seventy dollars, I assign over all my right, title and interest to within contract: Orrin Wilcox." Wilcox wished to reserve some trees as well as the wheat; but the defendant objected to this, as he did not wish to have them cut. It does not appear from the case when the assignment was executed; but the agreement by parol was three or four weeks before, when the wheat was reserved. The same thing was repeated when the writing was signed. The defendant's son testified that he thought he heard his father say that the wheat was reserved, and that it was Austin's. The defendant cut the wheat and put it in his own barn. There were 104 bushels.

NEW YORK,
May, 1828.

Austin
v.
Sawyer.

*The parol evidence of the contract between Austin and Wilcox, and of the reservation of the wheat, and also between Wilcox and the defendant, was objected to, and received subject to all legal exceptions.

[*41]

From the whole case, if properly before us, the justice of it is strongly with the plaintiff. But the plaintiff's right of recovery depends on the validity of his reservation of the wheat. The defendant shows an absolute conveyance, which is a complete answer to the action unless it can be obviated.

1. As to the evidence of the reservation. The contract was first made by parol, reserving the wheat; and when the quit-claim was executed, the same parol agreement reserving the wheat was again repeated. But there is no direct evidence of a contract respecting the wheat, subsequent to that conveyance.

"There is no rule of evidence better settled," says Chancellor Kent, (1 John. Ch. Rep. 429,) "than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement.

NEW YORK, Such evidence is not only contrary to the statute of frauds, but to the maxims of the common law."

Austin
v.
Wilcox.

The written instrument must be considered as containing the true agreement between the parties; and as furnishing better evidence than any which can be supplied by parol. (1 Ph. Ev. 406. 5 Cowen, 308.) The testimony in the case respecting the reservation between Austin and Wilcox, relates to conversations antecedent to, and at the time of executing the quit-claim conveyance. That trust of course be rejected, and expunged from the case.

All that remains relates to similar conversations between Wilcox and the defendant, and the acts of the defendant. Before Wilcox assigned to the defendant, he frequently admitted that the wheat belonged to the plaintiff. Had he sold it by parol to the plaintiff, and afterwards conveyed it to the defendant, would not the plaintiff be entitled to it on the ground that grain growing may be sold by parol, and that having been sold by a valid contract, Wilcox's assignment to the defendant, "being subsequent to the sale to the plaintiff, could convey to the defendant no greater right than Wilcox had?"

[*42]

In *Whipple v. Foot*, (2 John. 422,) it was decided by this court that wheat growing is a chattel, and may be sold as such on execution. [1] The same doctrine was held by this court in *Stewart v. Doughty*, (9 John. 112,) where it is added that the purchaser became entitled to the right of ingress, &c. to gather the crop. On this question the English cases seem to me not quite consistent. In *Poultet v. Killingbeck*, (1 B. & P. 398,) Buller, justice, in speaking of a parol transfer of half the growing crops, says, with respect to the point made at the trial on the statute of frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops. In *Crosby v. Wadsworth*, (8 East, 611,) Lord Ellenborough, speaking of a parol contract

[1] *Green v. Armstrong*, 1 Denio, 550. *Mumford v. Whitney*, 15 Wen. 387. *Carlington v. Root*, 2 Mees. & Wels. 248. *Steinburg v. Matthews*, 4 id. 343. *Jones v. Flint*, 10 Adol. and E. 739. *Worwick v. Bruce*, 2 Mees. & S. 205. *Graves v. Weld*, 5 Barn. & A. 105. *Walker v. Sherman*, 20 Wen. 638.

for the sale of a crop of growing grass, says, "I think that the agreement stated, conferring as it professes to do an exclusive right to the vesture of the land during a limited time, and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands." But subsequently, in *Parker v. Staniland*, (11 East, 363,) the same learned judge held that a parol contract for a crop of potatoes in the ground was valid; and the distinction he took was, that the one was growing, and the other had come to maturity; and also, that the one was not delivered, being not yet in a fit state for delivery; but the other was, by the agreement itself, delivered as far as they were capable of delivery. [1]

NEW YORK,
May, 1823.

Austin
v.
Sewyer.

The distinction taken by the supreme court of errors in Connecticut, (3 Day, 484,) is this: when there is a sale of property which would pass by a deed of land as such, without any other description, if it can be separated, from the freehold, and by the contract is to be separated, such contract is not within the statute.

Whatever may be the rule of construction elsewhere, we are not at liberty here to question the validity of a parol contract for the sale of growing crops. Was there any evidence of such a contract?

*Rejecting all that passed anterior to, and at the time of executing the written contract, the proof is that Wilcox, when treating with the defendant as to the sale of the farm, declared the wheat to belong to the plaintiff. This is sufficient in my judgment to authorize a jury to presume a formal and valid contract for the sale of the wheat.

[*43]

The title to the wheat then being in the plaintiff, it was not in the power of Wilcox to convey it to the defendant. Suppose Wilcox had leased this wheat-field for three years by parol, the lease would have been valid. Any absolute conveyance to him, subsequently, could not divest the rights of the lessee by parol. For the same reason, the assignment by Wilcox to the defendant, though absolute in its terms, conveyed no more than Wilcox had a right to con-

[1] *Green v. Armstrong*, 1 Denio, 550.

NEW YORK, *vej.* The crop of wheat, therefore, I consider legally shown to be the property of the plaintiff.
May, 1828.

Austin
 v. 
 Sawyer.

2. Could he, then, maintain his action? In answer to this question, I say in the language of Lord Ellenborough, (6 East, 610,) "As the plaintiff appears to have been entitled to the exclusive enjoyment of the crop growing on the land, during the proper period of its full growth, and until it was cut and carried away, he might in respect of such exclusive right, maintain trespass against any person doing the acts complained of." He cites Co. Lit. 4, b., and 3 Bur. 1824; in the first of which it is laid down, that whoever hath the vesture of the land, as the crops, shall have an action of trespass *quare clausum fregit*. In the latter (the case of *Wilson v. Mackreth*,) it was objected that trespass would not lie. Lord Mansfield said there wants nothing to answer the objection but to state the case, which he summed up thus: "The plaintiff's right is in a several piece of ground, butted and bounded; a separate right of property to take the profit of the turf, and to dig it for that purpose. The plaintiff has this right exclusive of all others, and the defendant has disturbed him in it; therefore, trespass lies though he has not the absolute right to the soil." Mr. Justice Yates said, whenever there is an exclusive right, trespass lies.

*44.

"In this case there was an exclusive right, necessarily, to the close, until the harvesting of the wheat. And in *Stewart v. Doughty*, (9 John. 113.) Kent, Ch. Justice, says, "The general language of the authorities is to this effect: that the grantee *vestura terræ* or *herbagii terræ*, may maintain trespass, though he has not the soil."

I am therefore of the opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff

NEW YORK,
May, 1828.GAY *against* CARY.Gay
v.
Cary.

MOTION by the plaintiff to set aside the report of referees, who reported nothing due to the plaintiff. The case will be found sufficiently stated in the opinion of the court.

C. P. Kirkland, for the plaintiff.

G. C. Brownson, for the defendant.

Curia, per SAVAGE, Ch. J. The action was assumpsit for board, washing, lodging, &c. of the defendant's servants, and for the rent of an office. Plea, the general issue. On the hearing, it appeared that the person (one Storms) for whose board the action was brought, was in the employ of a stage company, consisting of the defendant and several other persons. It was objected by the defendant's counsel that the plaintiff could not give evidence of any demand except such for which the defendant was solely liable; and so the referees decided.

The plaintiff offered one Nathan T. Sly as a witness, who was objected to on the ground of interest; and it was proved that Sly was one of the stage company to which the defendant belonged, and that in a settlement with the company, Sly had charged, and was credited for money paid the plaintiff for the board, &c. of Storms, this being part of the plaintiff's account against the defendant. The referees decided that he (Sly) was interested, and rejected him. The defendant *had demanded and received a bill of particulars which was entitled in the suit generally, and did not allege in any way that Storms was in the employment of a company.

In the case of *Williams v. Allen*, (7 Cowen, 318,) it was said, the law is well settled, that where there are several persons jointly indebted, or jointly responsible, and all of them are not made defendants, this must be pleaded in abatement, and cannot be taken advantage of at the trial. In that case Mr. Justice Woodworth goes on to state that

Where one of several joint debtors is sued alone he must plead the non-joinder in abatement, and cannot take advantage of it on the trial.

And the bill of particulars may run against the defendant alone, without mentioning his co-debtors.

Any of the co-debtors not sued are competent witnesses for the plaintiff against the debtor sued.

[*45]

NEW YORK,
May, 1828.

Gay
v.
Gay.

a bill of particulars may be called for; and if it sets forth a joint contract, it will not then be too late to plead in abatement. To do this, however, the bill of particulars must be obtained within the time of pleading in abatement. But if the bill of particulars does not show a joint contract, and no plea in abatement is put in, then the only question is upon the sufficiency of the bill of particulars.

The reason why an action should be brought against all the joint debtors is a technical one; that it is most convenient that there should be but one judgment against all who were liable to the plaintiff's demand. (5 Burr. 2613.) But, says Lord Mansfield, experience shows that convenience as well as justice lies the other way. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. A creditor knows with whom he dealt, but he does not know the secret partnership. It is cruel to turn a creditor round, and make him pay the costs of a nonsuit in favor of a defendant who is liable to pay the whole demand. In this way, a plaintiff may be nonsuited twenty times before he learns all the parties. The defendant knows who are his partners, and can, in his plea in abatement, give the information to the plaintiff.

Was the bill of particulars sufficient? The bill of particulars is an amplification of the declaration, (15 John. 222,) and is to specify the items of the plaintiff's claim, not the parties to the suit. It was sufficient.

The referees erred in refusing to hear the evidence.

[*46]

*They also erred in rejecting the witness Sly. If he had any interest, it was in favor of the defendant. If he had received the money from the company to pay the plaintiff's demand, and the plaintiff recovered it of the defendant, the witness would be obliged to refund.

The report of referees must be set aside; the case to abide the event.

Motion granted

NEW YORK,
May, 1828.

GREEN *against* GREEN.

Green
v.
Green.

ASSUMPSIT for money had and received; tried at the Madison circuit, on the 4th Tuesday of March, 1827, before WILLIAMS, C. Judge.

On the trial, a contract was proved between the parties, dated the 23d day of April, 1803, by which the plaintiff covenanted to pay the defendant \$75, with interest, on the 23d of November then next, and the further sum in four years, with annual interest, to be paid on the 23d of April each year, which with the \$75 and \$25 to be paid the 1st of July then next, would make \$4 per acre for half of lot 28, in township 18, in the tract of 20 Townships; and the defendant covenanted that, if the plaintiff should punctually perform on his part, then the defendant would execute to the plaintiff a good warranty deed of conveyance for the land; and it was mutually agreed, that if the plaintiff should fail to pay the \$75, then the defendant should be no longer bound, but might, at pleasure, abandon the contract; and, in such case, the \$75 should be paid as liquidated damages. The parties bound themselves to the performance, under a penalty of \$1000.

It further appeared, that Jonathan Lawrence was formerly the owner of the whole of lot No. 28, and by his agent, Judge Platt, gave a contract for the whole lot to William Green, the defendant, who thereupon, on the same day, gave a similar contract to the plaintiff. The whole lot contained 250 acres, and the plaintiff's half 125 acres. The plaintiff immediately went into possession under his contract, and in the summer following, paid \$25. In the autumn, he paid \$40, and in 1804, he paid \$200. The plaintiff continued in possession and made improvements, until five or six years ago, when the defendant took possession. Green Burdick bought 50 acres of the plaintiff,

To warrant a recovery as for money had and received, paid under a special contract, (e. g. a contract to convey land) a strict performance must be shown by the plaintiff, the same as if he had sued on the special contract itself, unless the contract has been expressly rescinded, or impliedly so, as by nothing having been done under it for a long time, or the party sought to be charged hav-

[*47]

ing acted inconsistent with it.

Thus where a party covenanted to pay money for land by instalments, on completing which he was to have a deed, and he took possession, and continued it for some time, making partial payments, but finally failed to pay, and the vendor took possession; in an ac-

tion for money had and received to recover back the money paid, *held*, that it would not lie. And the covenant to pay being independent, *held*, no breach that the defendant had never any title to the land; for *non constat*, had the plaintiff paid, that the defendant might not have procured a title and conveyed.

NEW YORK,
May, 1828.

Green
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and paid \$250, which was intended for the defendant ; but it did not appear that it was offered to him. It further appeared, that about 8 years ago, an ejectment was brought against the plaintiff, the defendant and Burdick. The defendant, at the same time, forbade the plaintiff doing any more work on the premises, saying the contract had run out, and the plaintiff should not have the land, and actually took possession. James Clapp, Esq., agent for Lawrence, proved that William Green's contract had not been fulfilled, and he had offered to the plaintiff, the defendant and Burdick, that if each would pay, \$100, he would give a contract to each one. The offer was not complied with ; but it appeared by other testimony that the plaintiff was ready and willing to comply with this offer on his part.

It was further shown or admitted, that the plaintiff had not paid up the amount of his contract ; that he had been in possession from 1803 to 1821, when the defendant took possession.

On these facts, the plaintiff's counsel contended that the defendant had rescinded the contract, and the plaintiff was entitled to recover the money paid, and interest.

The defendant's counsel contended that the special agreement was still in force, and unperformed by the plaintiff.

The judge decided that the evidence did not show that the contract was rescinded, and on that ground, the plaintiff was not entitled to recover ; that the plaintiff should have tendered the whole money due, and demanded a deed. He held that the money was to be paid before the conveyance ; that it should have been tendered, and a deed demanded and refused, or that the defendant should be shown otherwise in default.

The plaintiff excepted. Verdict for the defendant.

P. Gridly now moved for a new trial. He insisted that the acts and declarations of the defendant amounted to a rescinding of the contract on his part, or to an assent that the contract should be mutually abandoned by both parties.

Ordinarily, the plaintiff, in a case like this, must show a

tender of the whole money, and perhaps the demand of a deed; but not when the defendant rescinds absolutely. This excuses the tender; and so when he assents to a mutual rescinding. (20 John. 27. 1 T. R. 133. 1 Caines, 47. 1 Bro. P. C. 151. 1 Hen. & Munf. 428. Pow. on Contr. 418, 42. 14 John. 274. 5 id. 85. 3 John. Cas. 60. 3 John. Rep. 528. 2 Mass. Rep. 415. 14 John. 330. 10 id. 36. 7 Ves. 376, 7. 9 id. 230. 8 John. 476. 1 Chit. Pl. 317. 7 Cowen, 48. 7 John. 132.)

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Again; the defendant had forfeited his contract, and was ejected by the real owner. (11 John. 526. 2 Com. on Contr. 52. 12 John. 190. 14 id. 463, note).

The money paid may be recovered in an action for money had and received. If it be objected that the parties are not left in *status quo*, the answer is that such an objection never applies when the defendant rescinds absolutely, or assents to abandon; but is rather a reason why the contract should not be rescinded in case of mere neglect. It has no application where the defendant elects or assents to a rescinding; otherwise it would embrace all cases of part performance. (2 Com. on Contr. 75. 5 John. 85. 6 T. R. 606. 1 Wheat. Selw. 69, note (85.) 10 Mass. Rep. 31. 7 id. 31. 15 John. 508. 7 T. R. 181. 10 John. 85. 1 T. R. 133.)

The judge should, at least, have left it to the jury to decide whether the defendant had not rescinded, or assented to a mutual rescinding.

J. A. Collier, contra, relied on *Fuller v. Hubbard*, (6 Cowen, 13, and the cases there cited, including those cited by counsel.) In that case the money was paid, and the parties went on as here upon the special contract. The court held that the contract was therefore still open, and that the plaintiff must rely upon that. Here the plaintiff stopped short of his full payments. He never had a right to call for any act on the part of the defendant. Yet he claims the whole money and interest. Allowing such a claim, would work the most palpable injustice. The defendant should be put in default before he can be called on to refund.

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(*Ketchum v. Evertson*, 13 John. 365.) As to the defendant's incapacity to convey, that is no excuse where the covenant to pay him the money is independent; and the payment is to precede the act of conveyance. (*Robb v. Montgomery*, 20 John. 15.)

Curia, per SAVAGE, Ch. J. The only question in this case is, whether the contract has been rescinded. It is very clear that the payment of the money and the giving of a deed were not to be simultaneous acts. The covenant to pay was independent, and the payment of the money was a condition precedent. By virtue of the covenant, the plaintiff cannot call upon the defendant to perform until he (the plaintiff) performs or tenders performance on his part. [1] In the language of Spencer, Ch. Justice, in *Hudson v. Swift*, (20 John. 27,) "Had the plaintiff brought his action on the covenant, it would have been incumbent on him to aver and prove an offer to pay the residue of the consideration. The plaintiff's situation is not changed by suing for the money paid. He was bound to show the contract rescinded, or that he stood ready and offered to pay the balance due." This doctrine is not denied by the plaintiff's counsel, nor does he rely on showing an offer on his part to perform, and thereby put the defendant in fault. But he contends, that from the acts of the defendant, or of both parties, there is evidence of a rescinding of the contract by the defendant, if not of a mutual rescinding.

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What acts amount to a rescission of a contract? The cases generally discuss the rights of the parties consequent upon the rescission of the contract, rather than those acts which amount to such rescinding. The case of *Weaver v. Bentley*, (1 Caines, 47,) was in some respects like the present. The defendant contracted to procure for the plaintiff the title to a certain lot. The defendant did not pretend to have the title in that case, nor in this. In that case he failed to fulfil his contract after a compliance by the plaintiff. In this respect the cases differ. The plaintiff

[1] *Lutweller v. Linnell*, 12 Barb. 515, 516. *Connelly v. Pierce*, 7, Wen. 131. *Hacket v. Huson*, 3 id. 250. *Fuller v. Hubbard*, 6 Cow. 13. *Foot v. West*, 1 Denio, 546.

here has not fulfilled his contract; of course, on that ground, the defendant is not in default. In that case, this court said that the defendant having failed to perform on his part, the plaintiff had his election either to proceed on the covenant, and recover damages, or to disaffirm the contract, and, in assumpsit, to recover back what he had paid on a consideration which had failed. In that case, the court put either action upon the same evidence. The failure to perform the contract is there considered as the evidence of the rescinding; or rather failure by the defendant to perform enables the plaintiff to treat the contract either as valid, or as rescinded and at an end. The parties may mutually agree to rescind or disannul a contract previously made, or their acts may be construed into such a tacit agreement where nothing has been done in affirmance of the contract, but in disaffirmance of it for a long time, as in *Lady Lanesborough's case*, (cited *Pow. on Contr.* 413,) where a contract had been made between landlord and tenants which had not been acted under for 25 years; but the former relationship had existed between them as if no such contract had been made, and in direct contradiction to it. Such acts were held to amount to a waiver of the contract. But unless there is an agreement express or implied to rescind, the party claiming that the contract is rescinded must support that claim upon the fact of a violation of the contract by the other party. In the case of *Ballard v. Walker* (3 *John. Cas.* 60,) where an agreement was entered into to convey lands on certain terms, on which nothing was done for four years, the court presumed the contract rescinded.

In the case of *Gillet v. Maynard*, (5 *John.* 87,) there had been a parol contract to purchase land. The purchaser made some payments, and took possession. The administrator of the purchaser offered to pay the balance, and demanded a deed, which the defendant refused, but took possession and offered the premises for sale. The court say the conduct of the defendant can be viewed in no other light than as a relinquishment of the contract. These

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acts were inconsistent with a claim to have the contract completed.

The case of *Judson v. Wass*, (11 John. 525,) was an action by the vendor against the vendee. By the agreement, the plaintiff stipulated to execute a warranty deed subject only to quit rents. The premises were covered by a mortgage. The court held the plaintiff could not recover because he could not perform on his part, as his agreement was to convey an indefeasible title, which he was unable to do, and therefore the defendant was not bound to pay.

The case of *Tucker v. Woods*, (12 John. 190,) was decided on the same principle.

The case of *Ketchum v. Evertson*, (13 John. 363,) decides, that when a party engages to execute a deed, his covenant is satisfied by executing a quit-claim. In that case, Spencer, justice, also says, it may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, has never been suffered to recover for what has thus been advanced or done.

I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded, has not shown a breach of the contract on the other side, or what was equal to it. The only ground on which the defendant in this case has violated his contract, so as to justify the plaintiff in considering it rescinded, is assumed to be, that he took possession, saying the contract had run out. By this expression, I understand he claimed that by the contract he had a right to the possession, the plaintiff having as he supposed, forfeited all claim to the land. If this was his meaning, his acts were supposed by him to be in affirmance of the contract, and not in violation of it.

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*It is true that the defendant was at no time in a situation to execute a conveyance, as he had not the title. When the contract was entered into, the plaintiff knew

that the defendant had no title; and it depended partly on the plaintiff's fulfilling his contract, whether the defendant could procure a title, and thus fulfil his. I apprehend that fact did not excuse the plaintiff from offering to perform on his part. The payment of the money was a condition precedent to the execution of a deed; and before the plaintiff can completely put the defendant in default, he should show a readiness and an offer to perform on his part. Had this been done, the defendant might, for aught we can say, have procured a title from Mr. Clapp, who says he was always ready to give one on payment of the amount due. (*Robb v. Montgomery*, 20 John. 20.)

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In the case of *Weaver v. Bentley*, the court say the plaintiff has his election either to prosecute on the covenant, or to consider the covenant as rescinded, and recover back the money paid. Suppose we test this case by the rule in that; could the plaintiff maintain an action on the covenant? I apprehend not. On the contrary, according to the case of *Robb v. Montgomery*, the defendant might have maintained an action upon the covenant. The plaintiff therefore was in default himself, and not the defendant.

The motion for a new trial must be denied.

New trial denied.

BUSH against HENRY LYON and HARVEY LYON.

TROVER, to recover the value of a quantity of staves, tried at the Monroe circuit, March 15th, 1827, before BIRDBALL, C. Judge.

To warrant trover, the plaintiff must show a present right of possession in the

*To show title, the plaintiff produced a written contract with one Coonrad, dated January 4th, 1823, by which

[*53]
chattel. If it appear to have

been pledged by the plaintiff's vendor, before the sale, in order to secure a debt or duty to a third person, the plaintiff cannot recover, unless he show such debt or duty to have been discharged, or that the operation of the pledge has ceased in some other way.

One who claims property in himself in the chattel in question, in trover, is a competent witness for the defendant to show such property, whether it be special or general.

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Coonrad agreed to deliver to the plaintiff, on the canal, 40,000 pipe staves, and 40,000 hogshead staves, at \$14 per thousand for pipe, and \$9 per thousand for hogshead staves. On the back of the contract, Coonrad certified, (on the 28th of January, 1825,) that he had delivered to the plaintiff all the staves which he had made on Sina Wilcox's land. (There were no others in controversy.) They were turned out as security for advances on the contract, which advances, then, were \$160, 29; and in February and March following, \$73, 53; in all \$233 82; and \$51 were also paid, for which a separate receipt was given. The staves were then estimated at 40,000, and delivered to the plaintiff. They were then on Wilcox's land, some distance from the canal. Coonrad was to draw them to the canal. The hogshead staves were worth \$12, and pipe staves worth \$16. There were 16,000 barrel staves turned out to the plaintiff at the same time, worth \$6 per thousand. These facts were communicated to Henry Lyon, one of the defendants, before he purchased of Coonrad. Before Lyon purchased, the plaintiff had forbidden him to take the staves, but he said he should take them. Helon Mead, a witness, produced an instrument in writing, dated May 6th, 1825, from Coonrad to himself and Henry M. Starkes, conveying the staves and sundry other articles, as security for their being surety with him, (Coonrad) in several bonds and obligations. Mead and Coonrad sold the staves to the defendant Henry Lyon.

The defendants proved that about the 1st of January, 1825, one Christopher Worden and Coonrad bought the timber of Wilcox, from which the staves in question were made. Worden sold his interest to Coonrad, about a week after. About the 10th or 12th of January, Coonrad contracted with one Smith, of Lockport, to deliver him 25,000 staves. Worden became security for Coonrad to Smith, and Coonrad turned out to him (Worden) the staves and timber on Wilcox's land, to indemnify him. In April, Worden transferred all his interest in the staves to Henry M. Starks, who was substituted in Worden's place as security for Coonrad to Smith.

Starkes was then offered as a witness for the defendants, and objected to on the ground of interest, and rejected. The defendants then offered a release from Helon Mead to Starkes, and from Starkes to Mead, and from Starkes to the defendants, and from Henry Lyon to Starkes; but the judge rejected him.

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Soon after Starkes was put in the place of Worden, he and Coonrad and the plaintiff were together, and it was agreed that Starkes should draw the staves from Wilcox's land to the canal, and have half for drawing. The plaintiff agreed to look to the other half for his pay. They agreed that half would be sufficient to pay the plaintiff, and Smith's claim, for which Starkes was responsible. Starkes said he should hold on upon that half till Smith was paid. The plaintiffs did not object. One witness testified that he heard Coonrad say to the plaintiff, in presence of Starkes, that he had forfeited his contract, to which the plaintiff assented, but said he had a claim for money advanced. Starkes was again offered as a witness, and rejected.

The judge charged the jury, that the plaintiff's action was sustained for so many staves as were delivered to him on the 28th of January, 1825. Coonrad then conveyed all his title. The conversion was fully proved. That the transfer from Coonrad to Worden, and from Worden to Starkes, could have no influence, but to diminish the damages; that Worden had but a lien and that not to exceed \$126. It might be nothing. The amount was not shown. That Coonrad did not dispose of his whole interest to Worden, and the plaintiff had the residue. That Henry Lyon, if guilty, should pay the full value, as he had full notice. He submitted to them whether the plaintiff had relinquished his claim. That if the plaintiff was entitled to the property, he should recover the full value, deducting half for those drawn by Starkes, and a reasonable amount for the responsibility to Smith. That the community of interest between the plaintiff and Starkes, formed no objection to a recovery; that, even if tenants in common, this action would lie under the circumstances of the case. That in the opinion of the court, the plaintiff should recover of

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The defendant's counsel requested the judge to state to the jury whether the plaintiff could maintain this action if the jury should be of opinion that Starkes had a lien on the staves, until the lien was paid off, or a tender made. The judge declined charging the jury on that point, on the ground that, so far as it concerned this case, he had already decided it in his charge. Verdict for plaintiff, for \$888,33.

J. A. Collier, for the defendant, now moved for a new trial.

C. P. Kirkland; contra.

Curia, per *Savage*, Ch. J. The questions presented for the consideration of this court are, 1. Had the plaintiff such a property in himself as would enable him to maintain trover? 2. Was Henry M. Starkes a competent witness?

1. As to property in the plaintiff. There is no doubt that the whole property, at the time of the contract between Coonrad and the plaintiff, was in Coonrad, he having purchased the timber of Wilcox, about the 1st of January, 1825. The contract was on the 4th of January, 1825. By that contract no title to the property passed; but Coonrad then contracted to deliver the staves on the first of June then next. On the 10th of January, Coonrad contracts with Smith of Lockport, to deliver him 25,000 barrel staves, and Christopher Worden became surety to Smith for Coonrad's performance. A few days afterwards, Coonrad delivered to Worden all the staves he had made, and all the timber on Wilcox's land, as his security for having joined as surety for Coonrad to Smith. On the 28th of January, 1825, Coonrad delivered to the plaintiff all his staves and timber on Wilcox's land, as security for the goods and money advanced by the plaintiff on the contract of the 4th.

About the 1st of April, 1825, Worden became uneasy in his situation as surety for Coonrad; and it was agreed between him, Coonrad, Smith and Starkes, that Starkes should step into Worden's place as surety, and should

e staves as his security, which was accordingly
 f. this arrangement Worden informed the plaintiff,
 and that ne, (Worden) had relinquished all his rights in the
 staves to Starkes.

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On the 6th of May, 1825, Coonrad sold the staves on Wilcox's land to Helen Mead and Starkes, for money he owed them, and responsibilities incurred. Mead and Coonrad afterwards sold to the defendant, Henry Lyon, 23,000 staves.

It seems, then, that before the transfer of the staves from Coonrad to the plaintiff, they had been pledged to Worden, in whose place Starkes was substituted; Starkes then held them in pledge as his indemnity for having become surety for Coonrad in his contract with Smith. The judge very properly remarks, that it does not appear what that responsibility was; it might be \$150, (the value of 25,000 barrel staves,) or it might be nothing; for it does not appear whether Smith had advanced anything on the contract, or whether the contract had been broken. The staves were, however, pledged to Starkes as his indemnity. This was a lien older than the plaintiff's. The transfer to the plaintiff seems to have been by way of pledge too, but in effect, placed the plaintiff in Coonrad's place on the 1st of June, when the contract expired, and the plaintiff might consider the staves his own. He, however, had then no greater rights than Coonrad would have had, had he not conveyed the staves to the plaintiff. The plaintiff had not the actual possession; for Mead and Coonrad had sold the staves to the defendant Henry Lyon. He had not the right of possession until he had redeemed the pledge to Starkes. In contemplation of law the staves must be considered in possession of Starkes. The case does not state when the contract with Smith was to be performed; the presumption, however, cannot be that it had been performed. The property being shown to have been pledged, the plaintiff should have shown that the lien had been discharged. Not having done so, the possession and right of possession were in Starkes, until the power was redeemed. The plaintiff therefore had not that property in the staves which is necessary to maintain this action.

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*If I am right in the conclusion to which I have arrived, it is not necessary to the decision of this case, to take notice of the other point. But, as it has been argued and has been examined, I may properly state my conclusion upon it also. In trover, the real owner of the chattel is, in general, competent to defeat the action by proof of property in himself; for the record will not be evidence for him in any other action. (Stark. Ev. 1508.) In *Mix v. Cutting*, (4 Taunt. 18,) a witness was permitted to testify that he had received the property in question from the plaintiff as a security for money, and that according to his agreement with the plaintiff, he, the witness, had sold the property to the defendant. Mansfield, chief justice, said, the question is, whether the witness who bought a horse of the plaintiff is competent to prove that fact. I cannot possibly see any objection to his proving it; for, as between the witness and the plaintiff, or the witness and the defendant, the verdict which is obtained upon his testimony in this cause will be of no avail to him. So in *Ward v. Wilkinson*, (4 B. and A., 410,) it was decided, for the same reason, that a witness may prove property in himself. On both grounds, therefore, a new trial should be granted.

New trial granted

GLEASON and VIELE against CLARK, adm'r of CLARK.

A nonsuit before a justice, after hearing proof, cannot be reviewed by certiorari; but only by appeal. ON error from the Warren common pleas. The case is sufficiently stated in the opinion of the court.

In assumpsit by an attorney against his client, for fees, the attorney need not show that a copy of the bill of costs was served on the client before action brought.

Nor, on producing a taxed bill, need he show that notice of taxation had been served on the client.

The confession of a debt by one of several partners, after the dissolution of the partnership, is inadmissible evidence as against the other partners.

In an action for fees by an attorney against his client, the latter may show, under the general issue, that the attorney conducted the business so negligently that his services were of no benefit to the client; and thus defeat the whole claim. But if the evidence be merely in mitigation or diminution of the value of the attorney's services, then notice should be given with the general issue.

Proof, in such an action, that judgment as in case of nonsuit was obtained against the client, is not, *per se*, evidence of negligence.

An attorney is not bound to proceed in a cause unless his legal fees are tendered or secured to him, if he requests that this should be done.

*J. B. Lathrop, for the plaintiff in error.

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R. Weston, contra.

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Curia, per SAVAGE, Ch. J. Clark brought a suit as administrator, before a justice in Warren county, against Gleason and Viele for fees due Asael Clark, the intestate, in his life time, as an attorney and counsellor of the court of common pleas. The justice nonsuited the plaintiff, after hearing his proofs and allegations; and he appealed. The defendants moved the C. P. to quash the appeal, on the ground that there had been no trial before the justice; but the court overruled the objection. In this decision the court was certainly correct. The plaintiff could not review the justice's decision by certiorari; and of course an appeal was his only remedy. [1]

The plaintiff then proved that Gleason, one of the defendants, had admitted that he employed Clark, the intestate, to prosecute the two suits for the fees in which this suit was brought, to stop the defendants in those suits from taking lumber. Gleason promised to call on the plaintiff below, and make an arrangement. He did not intimate any defence on the ground of negligence. Another witness proved that 4 or 5 years before, Gleason and Viele were engaged in getting logs down the river; and that they were reputed to be partners in that business; but not general partners. That Gleason became indebted to the witness for board of himself and hands while engaged in that business, and Viele afterwards paid the witness's bill, saying he should have to pay Gleason's bills. It was then proved, by the attorney who defended those suits, that Clark, the intestate, prosecuted them, until finally judgment was rendered as in case of nonsuit, the plaintiffs having failed to bring them to trial. That he collected his costs by an action before a justice upon the judgment records in the common pleas; and Gleason and Viele confessed judgment. The

[1] The only mode of reviewing a justice's judgment, since the N. Y. Code took effect, is by appeal, which is but a substitute for the writ of certiorari. See § 351, of the code. *Whitney v. Bayard*, 2 Sanf. S. C. Rep. 634.

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taxed bills were then introduced, though objected to. What was the ground of the objection, does not appear. It was objected that notice of taxation and a copy of the bills should have been served. This objection was overruled. In this the court were correct. There is now no statute requiring the service of a copy of the bill. It was then objected that no evidence had been given against Viele; that the confessions of Gleason were not evidence against his copartner after the termination of the partnership. The court decided that a joint contract and employment had been sufficiently shown. There is no doubt that confessions of one partner, after the copartnership has ceased, cannot be shown, to charge his copartner. The English rule is, that such evidence may be given; but a different rule has been established in this court. [1] (8 John. 536. 15 John. 424.) The case in 1 Taunt. 104, to the contrary, is overruled here. The partnership was proved by other testimony; but the objection still recurs. Had the employment of Clark, the intestate, by Gleason been proved by other testimony than the confession of Gleason, it would have been sufficient. The reason why one partner, after the dissolution, cannot charge his copartner by his confessions, is, that it would be highly unjust that one man should confess away the rights of another; and if ill will should happen to exist between partners at their dissolution, one might ruin the other by his confessions, whether true or false. The court therefore erred in deciding that a joint employment had been sufficiently shown.

The defendants' counsel contended that it appeared the intestate had been guilty of negligence in the management of their causes; and they examined a witness who proved that he wrote to his clients about four weeks before the judgments of nonsuit, but whether they received the letter the witness did not know. The plaintiff insisted this defence could not be given in evidence under the general issue. The court decided that the defence of negligence was fully supported by the evidence; but it could not be

[1] See *Baker v. Stackpoole*, post 432.

received under the plea of the general issue. In both these particulars, I apprehend, the court erred. Under that plea the defendant may show that the plaintiff never had any cause of action. If this species of defence goes to destroy the plaintiff's claim entirely, it is proper under the general issue; if merely to reduce the damages, notice should be given. This seems the rule to be collected from *Runyan v. Nichols*, (11 John. 547,) and *Sill v. Rood*, (15 John. 231.)

But the evidence was altogether insufficient to charge an attorney with negligence. The same evidence might probably be shown in every case where judgment as in case of nonsuit is entered; and yet it is perfectly consistent with diligence and attention on the part of the attorney. It seems from Gleason's declarations, that the suits were brought to prevent the timber from being hooked, as he said. Possibly the attorney was instructed not to bring the suits to trial, or more probably, the clients neglected to procure the witnesses. Had the client shown a readiness on his part to go to trial, and then that the attorney neglected to give notice, there would have been some evidence. The attorney is not bound to proceed unless his fees are tendered or secured to him, if he makes that request. [1] But in this case it does not appear that the client paid any attention to his causes after they were commenced.

I am, on the whole, of opinion that the judgment below, which was for the plaintiff, be reversed, and a venire *de novo* awarded by Warren common pleas.

Rule accordingly.

[1] *Castro v. Bennett*, 2 John. 296. *Wadsworth v. Marshall*, 2 C. & J. 665. *Lawrence v. Potts*, 6 Carr. & P. 428.

The attorney must not abandon the cause, for want of funds, without giving his client notice, or he will liable to an action for negligence, and be deprived of his right to costs. *Hoby v. Built*, 3 B. & A. 350. *Lawrence v. Potts*, 6 Carr. & P. 428. *Nichols v. Wilson*, 11 M. & W. 106: S. C. 3

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*COLVIN *against* LUTHER.

To give a justice jurisdiction under a warrant upon the 50 dollar act, (sess. 47, ch. 238,) the defendant must be personally arrested, and bro't into court before the justice.

If not, a judgment rendered thereon, though upon a return regular on its face, of the defendant as in custody, and made by his consent, will be *coram non iudice* and void; and all persons acting under it will be wrong doers.

The confession of a judgment on the authority of a defendant, as upon a warrant, where he is not in fact arrested and brought before the court, is void.

The 13th section of the 50 dollar act, (sess. 47, ch. 238,) applies solely to voluntary judgments by confession, without process.

By that section, if the confession of judgment be not in writing, with the proper affidavit and particular, the judgment is void as to creditors; and a purchaser of chattels under the defective judgment, with notice of the defect, is not a *bona fide* purchaser within that section, and is liable to a valid levy and sale of the same chattels upon a subsequent execution at the suit of another creditor.

In case of a summons, the officer's return of service by reading, gives the justice jurisdiction of the person.

Where a court proceeds erroneously, the remedy is by certiorari or writ of error; but where there is no jurisdiction, all is absolutely void, and all concerned in enforcing the judgment are trespassers.

CASE agreed upon at the circuit, which is sufficiently stated in the opinion of the court.

J. A. Collier, for the plaintiff.

B. D. Noxon, contra.

Curia, per SAVAGE, Ch. J. This is an action of trover for two horses and a sulkey, purchased by the plaintiff at a constable's sale, upon executions issued by a justice of the peace, against one Williston.

After the purchase, the defendant, a deputy sheriff, levied on the same property by virtue of an execution against the same defendant, Williston. The justice's judgments were by confession, June 7th, 1826.

Two points are raised: First, That the judgments before the justice, under which the property was sold, were void for two reasons: 1. Because the defendant was not brought before the justice: 2. Because the defendant did not make confession in writing under oath.

Secondly. It is also said that the sale by the constable is void, because he refuses to state by virtue of what execution he sold.

The facts are, that one Dascomb held two notes against Williston, and took out regularly two warrants, which were regularly served. Williston being 18 miles distant from the justice, requested the constable to leave him, and to

appear *for him and confess judgment as his attorney upon the notes. The constable did so. He made a regular return upon the warrants, and appeared for the defendant ; and judgments were entered in due form ; one for upwards of \$30, the other for upwards of \$40. The sale was made on executions issued upon these judgments. The property was duly levied on. S. Strong was the receiptor. After the property was delivered to the constable, Mr. Strong, who was attorney for the plaintiff in the execution in the now defendant's hands, asked the constable if he was going to sell on Dascomb's executions. The constable said he should keep his own secrets. Mr. Strong then gave notice to the constable and the present plaintiff, that those judgments were void for the reasons I have first stated. The property was sold, and purchased by the plaintiff. If, therefore, the judgments are void, the plaintiff had notice, and is not entitled to be considered a *bona fide* purchaser.

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The most important point in this case is, whether the justice had jurisdiction of the person of the defendant Williston. The act of 1824, (6 Laws, 281 c. sess. 47, ch. 238, § 4,) requires that in all cases where a warrant shall issue, the constable shall be commanded to take the defendant and bring him or her forthwith before the justice, to answer the plaintiff in a plea in the same warrant to be mentioned ; and upon the defendant being brought before such justice, he shall proceed to hear and determine the cause ; and if the justice who issued such warrant shall, on the return thereof, be absent or unable to hear and try the cause, the constable serving the same shall *take* the defendant before the next justice, &c. In the next proceeding section (§ 3) directions are given how to proceed in the case of the defendant's appearance, or of his non-appearance ; but in the case of a warrant, there must be an appearance. In case of a summons, the officer's return of service by reading it, gives the justice jurisdiction of the person ; but in the case of a warrant the defendant is to be brought before the justice. The phraseology is different. In the case of summons, the defendant appears, or he does not appear : in the case of a warrant, he is brought before

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the justice. No provision is made for any proceeding in his absence. It appears to me that the fair construction of the fourth section of the act, requires the defendant's personal appearance before the justice gains jurisdiction of his person.

I do not find that this question has been passed upon in any reported case. In *Martin v. Moss*, (6 John. 126,) the court intimate that a confession without process may be made in person or by attorney. In such case, the voluntary appearance of the parties confers jurisdiction of the persons of the parties. The same principle governed the case of *Bromaghin v. Thorp*, (15 John. 476.) The case of *Sprague v. Shed*, (9 John. 140) was decided upon the ground that the cause was discontinued by reason of the plaintiff's not appearing. In that case, a warrant was issued, and two defendants were taken, one of whom appeared personally. Although there seems to be no express adjudication upon this question under this statute, yet there is an adjudication under one somewhat analogous. The 4th section of the act for suppressing immorality, (2 R. L. 184,) gives power to a justice of the peace to convict offenders against that act. It does not provide expressly, but impliedly, that the defendant shall be present before the justice previously to a conviction being had. In the case of *Bigelow v. Stearns*, (19 John. 39,) it was held that a conviction without causing the offender to be brought before the magistrate was void, because the justice had not jurisdiction of the person of the party convicted. That an inferior magistrate must have jurisdiction not only of the subject matter, but of the person, is there asserted and enforced, and the doctrine applied to proceedings under that statute: and Chief Justice Spencer, who delivered the opinion of the court, in conclusion, remarks, that under the 25 dollar act in a proceeding instituted by warrant, had the same facts occurred, the proceedings would have been erroneous. They would indeed have been not only erroneous but altogether irregular and void; the officer having no jurisdiction, the proceeding is *coram non iudice*. Such also is the opinion expressed by Mr. Cowen in his *Treatise*,

(p. 276.) "Upon a warrant, the defendant is actually arrested and brought before the justice." The judgment was clearly void so far as it depended on jurisdiction to be derived from the warrant and return.

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*2. As to the second subdivision of the first point, I am clearly of opinion that the 13th section of the 50 dollar act of 1824, (6 Laws, 286, c.) requiring an affidavit of the defendant upon confession, relates solely to confessions without process. But as the justice in this case professed to proceed upon the warrant, that clause is not operative.

The 13th section of the act of 1824, is similar to the 7th section of the act of 1818, which has received a construction by this court in the case of *Griffin v. Mitchel*, (2 Cowen, 548.) That case differs from the present in this important particular, that there the justice had jurisdiction. When there is jurisdiction, but the magistrate proceeds erroneously, the remedy is by certiorari or writ of error; but when there is no jurisdiction, all is absolutely void, and all are trespassers. [1] Being of opinion that the judgments were unauthorized, and not within the jurisdiction of the justice, the executions were no protection to the officer, and being void, a sale under them did not alter the ownership of the property. Taken as judgments by confession, independent of the warrant, they are equally void as to the execution in the hands of the now defendant, which was at the suit of another creditor of Williston. The 13th section of the act of 1824, expressly declares this

[1] This rigorous rule has been materially qualified; and it has been decided, that a ministerial officer is protected in the execution of a process, issued by the court of limited or general jurisdiction, although the court has not in fact jurisdiction of the case, if on the face of the process it appears that the court has jurisdiction of the subject matter, and nothing appears therein, to apprise the officer that the person is without the jurisdiction of the court. *Savacool v. Broughton*, 5 Wen. 170. See also *McQuinty v. Herriek*, id. 240. 6 Wen. 367.

It has been even held that a ministerial officer is protected if the process is regular and legal on its face, although he has knowledge of facts rendering it void for want of jurisdiction. *Noble v. Holm*, 5 Hill, 194. *Webber v. Gay*, 24 Wen. 485. *Watson v. Watson*, 9 Conn. 140. This rule, one of protection only. The officer cannot build up a title under it, so as to maintain actions upon it against third persons. *Horton v. Heidershot*, 1 Hill, 118.

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as to a purchaser not *bona fide*; and we have seen that the plaintiff had full notice, and therefore did not purchase *bona fide*. The horses and sulkey in question were, in either view, therefore, the property of Williston when the defendant levied on them.

The plaintiff having acquired no title to the property cannot maintain this action.

According to a stipulation in the case, judgment of non suit is to be entered, with double costs to the defendant.[1]

Rule accordingly.

[1] See *Easton v. Chandler*, 11 Wen. 91.

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*MERRILLS *against* LAW.

An agreement to pay more than legal interest for money loaned, on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the mere amount lent, with legal interest only.

But if the agreement to pay more than legal interest be subsequent to the time of the loan, though such agreement be usurious, yet it will not avoid the note. [1]

Where a court, in charging the jury, recapitulates the testimony of a witness, and the counsel for one of the parties insists that the court misunderstood the testimony of the witness in a material part, and proposes to call him, in order to explain, it is discretionary with the court whether he shall be called for that purpose. But if the court err in the exercise of that discretion, a writ of error will be sustained for that cause.

A witness was called to prove usury in a note, and it was material whether his testimony related expressly to the time of giving the note, or left it open for the jury to infer that it might have related to a time subsequent. The court in their charge stated it in the latter sense. Counsel insisted the evidence was misunderstood, and proposed to re-examine the witness upon the point. This the court refused to do; *held*, error.

It is not uncommon for witnesses to be re-examined by the jury, if any disagreement arises after they have retired to consider of their verdict.

Where in an action on a note, the defence was usury, founded on an agreement for more than 7 per cent. made at the time of the loan, and witnesses were examined, who proved an agreement for more than 7 per cent. without showing, in express terms, that it was at the time, and not showing that it was subsequent, and no subsequent agreement appearing, or being alluded to in the course of the trial: *held*, that the court should have charged the jury that the inference of law was, that the agreement alluded to by the witnesses was at the time of the contract of loan; and the court not having so charged, error lay.

Bad terms, or want of good understanding, between a witness and the party against whom he is called to testify, or the endorser of that party, is matter of credit, to go to the jury.

[1] *Hammond v. Hopping*, 13 Wen. 505. *Rice v. Welling*, 5 *id.* 595. *Cram v. Hubble*, 7 Page, 413. *Crippin v. Hermance*, 9 *id.* 211.

Curia, per SAVAGE, Ch. J. Law sued Merrills in the common pleas on a note dated June 29, 1822, payable to Sally M. Jones or bearer, and by her endorsed to the plaintiff below. The defence was usury. The first witness, Wilson, testified as stated in the bill of exceptions, that in the summer of 1822, before Miss Jones, the payee, was married, he heard her say she had lent money to Merrills, for which she received about double interest; the witness understood 12 per cent. She showed this note, and said she was to have nearly double interest. Alfred White testified, that before the loan was made, Miss Jones told him that Merrills was to give 12 per cent. This witness was not on good terms with Miss Jones. John F. Merrills saw the defendant below pay Miss Jones \$10 extra interest in December, 1822.

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On the part of the plaintiff below, it was proved by Darrow that the defendant below said the note was given for the amount received, and no more.

The judge charged the jury, that if, at the making of the loan, it was agreed between Miss Jones and the defendant below, that he should pay more than 7 per cent. the defendant below would be entitled to their verdict; but if they believed from the testimony, that the note was given for the amount of money advanced, and the agreement to pay extra interest was made subsequently, with a view to obtain further indulgence, such agreement would not affect the note, and the plaintiff should recover.

In charging the jury, the judge recapitulated the testimony. The counsel for the defendant below insisted that the court had misunderstood the testimony of Wilson; and that he testified that Miss Jones stated to him that, when the money was loaned and the note given, it was agreed between her and Merrills that he should pay 12 per cent. interest; and insisted on the court's calling Wilson to ascertain whether he had so testified or not. The court decided that it was a matter of discretion whether to permit a witness to be interrogated after the cause was submitted to the jury, and refused to re-examine Wilson. The defendant's counsel excepted, and the jury found for

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the plaintiff below. A case was made, and on the argument of the motion for a new trial, an affidavit of Wilson was produced, stating that he had sworn as the defendant's counsel had stated his testimony at the time of the charge. The court refused a new trial.

An objection has been taken to a clerical error in the record, but I am of opinion the court erred in the merits.

Usury is commonly an unconscionable defence, but it is a legal one; and if proved, courts must sustain it. Usury was, in this case, clearly proved by the testimony of Alfred White; but it is supposed that this was answered by the testimony of Darrow. There is no contradiction between them. Usury consists in the corrupt agreement of the parties, by which more than lawful interest is to be paid.

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White swears to the agreement, and that the note was given for the amount loaned. Darrow does not disprove the agreement. He corroborates White as far as he goes. The defendant confessed that the note was given for no more money than he received. So says White. The defendant below said to Darrow that he could prove he had paid more than 7 per cent. That fact does not of itself prove usury: but it certainly does not disprove it. There is nothing to discredit White but the fact of bad terms between him and Miss Jones; and that should have been weighed by the jury in ascertaining what credit was due to him. Wilson's testimony, as stated at first, strongly corroborates White. It is this: that in the summer, when the note was given, Miss Jones showed him the note, said she had made a good bargain, and was to have nearly double interest. The court told the jury that if this testimony had relation to a subsequent contract to procure forbearance, it was not usurious. This was certainly correct. The note, it is true was payable in ten days, and therefore due in July, and possibly before this conversation. But when Wilson's testimony is considered as presented to the court on the application for a new trial, it rebuts any such presumption. He swore then that Miss Jones told him that such was the contract when she lent the money. If this is to be considered his testimony before the jury, it

was a clear case of usury ; if, as stated in the bill of exceptions, the fair presumption is, that Miss Jones spoke of the contract of the loan, and not of subsequent forbearance. Not one word had been said of such forbearance, or of any agreement but the loan itself.

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The next question is as to the correctness of the court in refusing to re-examine the witness, Wilson. It is certainly true, that there is, and must be, a discretion in the court as to the examination of witnesses after both parties have summed up to the jury. It is not uncommon for witnesses to be re-examined at the request of the jury, when any disagreement arises, after they have retired to consider of their verdict : and when counsel allege that the court has stated the testimony incorrectly to the jury, I should think it highly *discreet in the court to ask the witness then in court whether they misunderstood it.

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But it is said this court cannot control the discretion of the court below. Whether that proposition be true or not, depends I apprehend, on circumstances. If it be that discretion which is to be exercised according to law, then this court has power to interfere, and correct any error fallen into by the tribunal which acts at discretion. (Jac. L. D. tit. Discretion.) The discretion which a judge at the circuit, or a court of common pleas possesses, as to receiving testimony after the parties have closed the evidence, has always been treated by this court as within their control. In the case of *Alexander v. Byron*, (2 John. Cas. 318,) an application was made for a new trial, because the judge had refused to receive a witness for the defendant, after the counsel had commenced summing up. This court said it was not matter of strict right with the party, but of discretion in the judge, according to circumstances. They then go into an examination of the circumstances, and conclude that the judge exercised a due discretion. In *Mercer v. Sayre*, (7 John. 306,) after the defendant's counsel had summed up, and while the plaintiff's counsel were summing up, the defendant's counsel discovered some written evidence which they wished to submit to the jury, and which the judge refused. On an application for a new trial, the

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court said the evidence offered was material ; that the judge had a discretion to admit the evidence, and it ought, in sound discretion, to have been received ; and a new trial was granted on that ground. In *Jackson v. Tallmage*, (4 Cowen, 450,) a new trial was refused, this court remarking, that we could not say that the discretion of the judge was not properly exercised. All these were cases of admitting new witnesses, or offers to introduce new testimony. Here it was proposed to ask a witness in court what he had already sworn. In my judgment, the exercise of a sound legal discretion required a re-examination of the witness. [1]

But, independent of this ground, (which I think sufficient,) I am of opinion that the court should have charged the jury that the inference of law was, that the bargain spoken of by *Miss Jones to Wilson was the contract of loan. No other had been alluded to. I know this is a defence not favored, and the leaning of courts and juries is against it ; but, so long as it is legal, we must take care and not lean too far. [2]

The judgment must be reversed, and a venire *de novo* issued.

Rule accordingly.

[1] This decision was reversed in the Court of Errors. See S. C. 6 Wen 268. *People v. Rector*, 19 *id.* 569. *Meakin v. Anderson*, 11 Barb. 215

[2] But see S. C. 6 Wen. 268.

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EJECTMENT, for two small adjoining pieces of ground; one covered by a stable, and the other by hay-scales; the former being part of the two acre lot alleged to have been conveyed by the lessor of the plaintiff, for the purpose of having the Chenango court-house built upon it, and on part of which the court-house was built.

The cause was tried at the Chenango circuit, January 31st, 1827, before NELSON, C. Judge.

At the trial, the evidence to show that the defendant was in possession of the hay-scales, was, that he had removed them from the place where the stable now stands, on to the land of the lessor of the plaintiff; and had not afterwards interfered with them.

The defendant was gaoler, and possessed the stable, and occupied it.

As to the two acres; the lessor of the plaintiff, by deed of June 3d, 1807, between himself and wife, of the first part, and the supervisors of Chenango county, of the second part, expressed, "as well for and in consideration of accommodating the said parties of the second part, with a proper and convenient site for erecting a court-house and gaol for said county, as for increasing the value of property owned by the said parties of the first part, adjacent to the hereby granted premises," conveyed them to the supervisors; *habendum* to them, "their successors in office and assigns, for their own proper use, benefit and behoof forever;" with covenants of seisin, quiet enjoyment, further assurance and warranty.

It appeared that this deed was executed at the time when the site for the court-house was established. Two other places were talked of by the commissioners for fixing the

Merely moving hay-scales on to the ground of another, and never afterwards interfering with them, does not amount to a possession in the party removing, so as to subject him to an action of ejectment.

A pecuniary consideration is necessary to support a deed of bargain and sale; but this is not confined to money alone.

The rule is modified by a deed of a lot for a court-house, expressed to be as well in con-

[*70] sideration of accommodating the grantees with a site for a court-house and gaol, as for increasing the value of the grantor's adjoining land.

To support a deed of bargain and sale, a consideration may be shown *dehors* the deed.

Whether a deed in fee for the purpose of

a court-house and gaol, includes an implied condition that it should be used for no other purpose? *Quere.*

But if it does, the erection of a stable on the premises is not a violation of the condition. The grant includes the right of erecting a dwelling-house for the gaoler, with proper out-houses, his garden, &c..

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site; but the lessor of the plaintiff offered them, that if they would establish the site where the court-house now stands, he would convey the land to the county.

The defendant offered evidence that the land of the lessor of the plaintiff was increased in value for that cause. This was objected to, but the evidence was received.

The judge ruled that the defendant was not in possession of the hay-scales; and therefore the plaintiff could not recover the ground covered by them.

The plaintiff objected that the consideration of the deed was not sufficient to give it effect. The judge decided that the deed was valid.

The plaintiff then contended that there was an implied condition in the deed, that if the premises should be converted to any purpose other than a court-house and gaol, the deed should be void. The judge decided otherwise; and the plaintiff was nonsuited.

J. A. Collier, now moved to set aside the nonsuit, and for a new trial.

L. Clark & S. Sherwood, contra.

Curia, per SAVAGE, Ch. J. There was no evidence to show the defendant in possession of the hay-scales. In the fall of 1825, they stood where the stable now stands. The defendant then removed them into an enclosed field of the lessor of the plaintiff; and has not since occupied them. It was correctly held that the defendant was not in possession.

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*As to the stable, it stands on a lot of two acres, conveyed by the lessor of the plaintiff to the supervisors of Chenango county; and whether the plaintiff is entitled to recover depends upon the validity of the conveyance. The deed is, "that the said parties of the first part, as well for and in consideration of accommodating the said parties of the second part with a proper and convenient site for erecting a court-house and jail for said county, as for increasing the value

ty owned by the said parties of the first part, to the hereby granted premises, have given, granted, &c. *habendum* to the parties of the second part, and their successors in office, and assigns, for their own proper use, benefit and behoof forever. Then follow full covenants.

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This deed was given in consideration that a court-house should be built upon the land; which was done, and the lessor's lands were, in consequence, immediately and materially, enhanced in value by fixing the site, which was done upon the execution of the deed. The defendant is gaoler; and said he was authorised by the supervisors to build the stable.

The plaintiff's counsel contended the deed was void for want of a consideration. The judge decided it was valid. The plaintiff's counsel then contended that if the deed was valid, there was an implied condition, that if the premises should be used for any other purpose than the erection of a court-house and gaol, the deed should be void; and that the erection of the stable was a breach of the condition. The judge decided otherwise, and nonsuited the plaintiff.

The principal question is, whether there was a consideration to support the deed from the lessor to the supervisors. That a consideration is necessary, was not questioned, and has been so often decided, that the principle is familiar. (9 John. 492. 16 John. 48.) It has been also decided frequently, that to support a deed as a bargain and sale, a pecuniary consideration is necessary.

In the case of *Jackson v. Alexander*, (3 John. 492,) the words *for value received* were held sufficient evidence of a consideration appearing upon the face of the deed, to conclude the grantor, and give efficacy to the deed as a bargain and sale. Ch. J. Kent there says, that the consideration is merely nominal, even a pepper corn being sufficient, and no enquiry is ever made whether the consideration was actually paid. *Value received* was equivalent to saying money or a chattel was received. It is an admission of a *quid pro qua*.

In the case of *Jackson v. Florence*, (16 John. 48,) the

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deed was adjudged void for the want of a pecuniary consideration. The consideration there stated was the support of the grantor, which the court held not sufficient, because the grantor was under no obligation to afford such support; and it seems conceded, that an obligation to that effect would have been a good consideration. The case of *Jackson v. Delancy*, (4 Cowen, 430,) was decided upon the same principle.

It is not, then, the payment of money alone which constitutes a pecuniary consideration; but, in the language of Ch. Justice Kent, a *quid pro quo*. The establishing of the site of a court-house was, in this case, the *quid pro quo*, the consideration. [1] That was done simultaneously with the execution of the deed, and the grantor's property adjacent was immediately enhanced in value in consequence of the location of the public buildings.

There was then a sufficient consideration; and that parol proof is admissible to prove the consideration in a deed, is decided in *Jackson v. Fish*, (10 John. 456.) [2] Here the parol proof was in corroboration of the consideration mentioned in the deed.

But it is further contended that there was an implied condition in this deed, that the premises should be used for no other purpose but for the erection of a court-house and gaol. If that be admitted, does it follow that the building a stable upon the lot for the accommodation of the gaoler, works a forfeiture of the grant? I think not. The grant must have a reasonable construction. Two acres were not

[1] *United States Bank v. Housman*, 6 Page 526.

[2] *Wilson v. Betts*, 4 Denio, 201.

Formerly the consideration mentioned in a sealed instrument was as evidence, conclusive, between the original parties and their privies: but now in New York, it is only presumptive evidence which may be rebutted. See *Revised Statutes*, 4th ed. 653, § 107. Provided such defence be pleaded, or notice given thereof, at the time of pleading the general issue or some other plea denying the contract on which the action is brought. *id.* § 108. *Case v. Broughton*, 11 Wen. 106. *Russell v. Rodgers*, 15 *id.* 351. *Fay's Adm'rs. v. Richards*, 21 *id.* 627. *Mercerin v. The People*, 25 *id.* 106. *Van Epps v. Harrison*, 5 Hill, 66. But it cannot be contradicted in a case free from fraud, to avoid the conveyance. 2 Denio, 336.

necessary to erect a house upon, less than a hundred feet square. What then becomes of the balance of the two acres? They are no doubt appurtenant to the court-house and gaol. The gaoler must have a place to reside. He must have the usual conveniences for a family, and the necessary out-houses; and I should think he might have the use of the other ground for a garden, or any other purpose not inconsistent with the grant. It does not follow that those grounds are to lie waste.

*But, in my judgment, an occupation of the premises in the ordinary mode of occupying village lots, is not inconsistent with the grant.

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Motion to set aside nonsuit denied.

JACKSON, *ex dem.* CARY against PARKER.

EJECTMENT for land in Genesee, tried at the circuit in that county, July 6th, 1826, before BIRDSALL, C. Judge, when the case was as follows:

On the 4th day of June, 1819, one Jeremiah Parker, father of the defendant, contracted with the Holland Land Company, for the purchase of the premises in question, and entered into a written agreement, by which J. Parker agreed to pay them \$175, the amount due them, in six equal annual instalments, as the consideration money; (part having been paid under a previous article;) and the company agreed, that on payment of the money in the manner and at the times specified, they would convey to him, or such person as he should appoint. But if he should fail to make the payments as stipulated, the covenant to convey should be void.

One who is in possession of land under a contract of purchase, has a real estate in the land, within the statute, (1 B. L. 500,) which is bound by a judgment in a court of record. And therefore if he assign his interest and possession after judgment, tho' before a *f. fa.* levied, yet the lien of the judgment continuing, his interest may be sold upon the execution.

The docketing of the judgment is notice to the purchaser, as in other cases. A sale of land by one indebted at the time, in consideration of supporting his family, is fraudulent and void as to creditors; and if a jury find the sale valid as to creditors, a new trial will be granted.

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On the 20th June, 1820, Trumbull Carey and William Davis recovered judgment in the Genesee C. P. against Jeremiah Parker, for \$195 25; on which a *fi. fa.* was issued, and delivered to the sheriff on the 5th of May, 1821, seven days previous to which, to wit, on the 28th of April, 1821, Jeremiah Parker, by a written assignment, for the consideration expressed to be \$1000, sold and transferred all his right and title in the article above mentioned to his son Albert Parker, the defendant.

On the 21st of June, 1821, the sheriff sold the premises on the execution against Jeremiah Parker, and the lessor of the plaintiff became the purchaser, and received a deed from the sheriff, May 25th, 1825.

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At time of docketing the judgment, and at the time of the sale to his son, Jeremiah Parker was in possession, claiming title under the above contract, which was the last of several that he had held for the same premises, he having been in possession altogether about 16 years. When this suit was commenced, the defendant was in possession, and had been for two years.

The plaintiff objected to reading in evidence the assignment to the son, on the ground that it was executed after docketing the judgment in favor of Carey and Davis, under which the plaintiff made title; but the judge decided that the possessory interest of J. Parker was not bound by the docketing of the judgment, but by the delivery of the execution to the sheriff. The plaintiff excepted.

An objection was made by the plaintiff's counsel, that, by the assignment, no interest passed in the land, but in the contract only. The judge decided that the assignment and possession under it, transferred all J. Parker's interest, as well in the land as the article. The plaintiff excepted.

The defendant then proved that though nothing was paid by him for the farm, yet he was to support the family of his father. That Jeremiah Parker, the father, was very intemperate; that the defendant was of age, and had left home, but returned when the assignment was given, and had supported the family ever since. Jeremiah was sent to the state prison soon after the assignment, and had just

been pardoned. That \$1000, with what was due at the land office, were the full value of the farm.

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The fact of the defendant's support of the family was proved by his mother, who was objected to as incompetent, and the testimony was also objected to as proving a consideration different from that expressed in the assignment. The judge admitted the testimony, on the ground that it was only showing the manner of payment of the consideration expressed.

It was in evidence that Carey and Davis had a large demand against J. Parker, which was known to the defendant; and some expressions of his were proved, to show an intent to defeat them in the collection of their debt.

The plaintiff's counsel contended, that as the conveyance was from the father to son, and confessedly for the support of the family, the assignment was fraudulent in law; and void as against creditors.

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The judge charged the jury, that the judgment was not a lien on J. Parker's interest in the land. That at the time of the assignment he had a right to sell it *bona fide*, and apply the money to the support of his family; and that the defendant might, therefore, agree to pay in supporting the family. That the defendant's knowledge of the existence of the judgment did not, of itself, render the assignment fraudulent; but that this, together with the relation existing between the father and son, were circumstances of suspicion, and required them to scan the transaction critically. That if they found the object of the assignment was that the defendant should become the owner of the property, and support the father's family to the amount of the consideration, aside from any purpose of defeating the collection of Cary and Davis's judgment, and other creditors, then it was valid, and the plaintiff must fail. The jury found for the defendant.

Talcott, (attorney general,) for the plaintiff now moved for a new trial. He said that when the judgment of Cary and Davis was docketed, Jeremiah Parker had an interest

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in the premises, subject to be sold on an execution. True, a mere equitable interest cannot be sold on execution; but if connected with the possession of the land, the legal interest, of which the possession is evidence, may be sold. This is the very language of the court in *Jackson v. Scott*, (18 John. 98,) and it meets this case exactly. *Howard v. Easton* (7 John. 205,) is cited, which held that possession is of itself an interest in land, within the statute of frauds. Such being the rule in respect to Jeremiah Parker's rights, when the judgment was obtained, his son and assignee, who comes in under his father, can no more raise an objection against its application, than the assignor himself. The assignee takes *cum onere* in all cases. The interest of J. Parker was not chattel property in any view. It would, on his death, have descended to his heir. (Com. Dig. Chancery, (2 C. 1.) *Edwards v. Countess of Warwick*, 2 P. Wms. 171, 175, 6.) And the only way to apply it to the payment of his debts would be either by action against the heir, or by a surrogate's sale on the petition of the personal representative. The act concerning judgments and executions (1 R. L. 500, § 1,) makes all judgments of a court of record a lien on the debtor's lands, tenements and real estate. If it be objected that the execution is by the same statute, (1 R. L. 502, 3,) to command a levy on lands or tenements of which the debtor is seised, we answer, the term *seised* is broad enough to comprehend an equitable as well as a legal seisin; and such was its object, and such has been its construction. (*Waters v. Stewart*, 1 Cain. Cas. Err. 66. *Jackson v. Town*, 4 Cowen, 631.) Thus, if the sale to the son was not fraudulent, yet the interest was bound.

But the sale was fraudulent in law as against all antecedent creditors; and fraudulent in fact, as against Cary and Davis. The matter should not have been put to the jury as a naked question of fact. There is no need of direct proof and actual intent. Under the circumstances of this case, the fraud cannot be gainsaid. It is a *præsumptio juris et de jure*. Nothing was paid. It was a voluntary

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conveyance. (*Bennett v. The Bedford Bank*, 11 Mass. Rep. 421. *Sexton v. Wheaton*, 8 Wheat. 229. *Reade v. Livingston*, 3 John. Ch. Rep. 481.)

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But if the question was properly put to the jury, they erred in finding against the fraud.

The judge erred in admitting evidence to show that the consideration of the assignment was not money as expressed in it, but the future support of the family.

F. M. Haight & H. Bleecker, contra. Jeremiah Parker, the father, never had any interest in the land which was the subject of sale under an execution at law, except the possession: and no lien on that interest could be created except by actual levy under an execution during the existence of the possession. It was held, In the matter of *Merry v. Hallet*, (2 Cowen, 497,) in which the court followed *Vredenburg v. Morris*, (1 John. Cas. 223,) that a judgment is not a lien on a term for years, a chattel real; and will it be pretended that a possession of Jeremiah Parker was a higher interest? *Jackson v. Town* (4 Cowen, 631,) does not impugn the doctrine of *Merry v. Hallet*. Seisin of some sort, which can be said of freehold only, must be shown in the defendant, at the time of the judgment, in order to make that a lien. With this accords the form of the execution. An equitable seisin can not exist in any one who does not own the whole equitable interest. Here was no pretence of seisin, by right or wrong, in Jeremiah Parker, but a mere naked possession in subordination to the right owner. (*Taylor v. Horde*, 1 Burr. 60.) No person could be seised here, except the Holland Company, who had merely agreed to give a deed; but had in fact conveyed nothing in the land. Here was no such technical trust in Jeremiah Parker, as is subjected to execution within the statute, (sess. 10, ch. 37, § 4, 1 R. L. 74;) but the most that can be pretended is a mere inchoate equitable interest, which an execution cannot pass, of which a court at law knows nothing, and which it can not protect or enforce. (*Bogart v. Perry and others*, 1 John. Ch. Rep. 52. 17 John. Rep. 351, S. C. on appeal.) This case is full

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NEW YORK, upon the point; and was decided by our court of *dernier*
May, 1828. *ressort*. True, possession is *prima facie* evidence of a legal title; yet when the extent, the nature, the character of the possession is ascertained, it can be evidence of no greater right than in fact exists. If Jeremiah Parker was not seised, it follows that he had no other than a chattel interest, which could not be bound by the judgment, but only by execution. In *Jackson v. Town*, a mere abandonment of the possession by the judgment debtor, was held to destroy the seisin and prevent the effect of the judgment as a lien. Can it be, that not only an abandonment of possession, but actual transfer of the right, shall have a less effect here in respect to the judgment and execution? Certainly not in respect to the judgment, unless there was a seisin by which the defendant must be bound as an assignee, claiming under his father as an assignor. *Jackson v. Scott* (18 John. 64,) cited on the other side, establishes nothing incompatible with the previous case of *Bogart v. Perry*; but that case is referred to and its doctrines expressly recognized in *Jackson v. Scott*; and the two cases, when properly understood, will be found to harmonize perfectly. In the latter, the transfer was voluntary and fraudulent as to creditors. It was therefore void, and the possession never changed. Every thing in that respect remained in *statu quo*. Though actual possession was changed, yet the assignee held for the assignor, whose seisin continued. *Howard v. Easton*, (7 John. 205,) cited against us, was a case upon the statute of frauds. That statute applies to all interests in the land, or real estate, whether freehold or lease, and is therefore much more extensive than the statute declaring the nature of the interest upon which a judgment shall operate as a lien. No doubt the former statute applies to chattels real; the latter we have seen reaches freehold only

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We ask again, how is Jeremiah Parker's interest to be made the subject of seisin? He was under a contract not paid up. He was a mere vendee, under an executory contract, or covenant of sale. What right can be acquired in such an interest at sheriff's sale? Does the purchaser be

come substituted for the vendee under the contract? No. If any thing be settled, it is, that a mere equitable interest cannot be the subject of a lien or sale by a judgment or execution. What can be sold? The possession only. That is gone when the execution comes, and there never was any *seisin*. What then was there left for this sale under execution to operate upon? Is there a third estate neither freehold nor chattel, a sort of *tertium quid*, which was bound by this judgment. We admit that we are left in some confusion on this question by the books, owing to such an estate being there recognized; a union of the possession with an equitable estate. When fairly considered, however, we do not come within them. There is no such thing here. The idea must be totally discarded in considering this case. The possession being gone, when the execution came, all that remained was a mere naked chose in action. Nothing but the actual possession could ever have been sold; and then the sheriff's vendee might have been removed by the real owners at any moment. He never could even call for and enforce a conveyance.

It is said, the interest of Jeremiah Parker was descendable to his heirs. The argument would be true in a court of equity; and the authorities cited in support of the position, sustain it as to that court only. They furnish no test in a court of law, where, it should be remembered, we stand.

If we are correct as to the nature of Jeremiah Parker's estate, then fraud cannot be predicated of it. The actual change of possession, from whatever motive, turned his interest into a naked chose in action, and nothing was left for the judgment or execution to operate upon.

But if we are mistaken in this view of the question upon the fraud, then we say that question was disposed of by the jury. The notion of fraud in law, advanced in *Reed v. Livingston*, (8 John. Ch. Rep. 461,) and iterated in *Jackson v. Seward*, (5 Cowen, 67,) is now exploded by the decision of the court of errors in the latter case, (a) who held that fraud is a proper question for the jury, on which their

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(a) *Seward v. Jackson*, 3 Cowen, 407

NEW YORK, finding must be conclusive (*Hinde's Lessee v. Long-*
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 Jackson actually paid, yet the son was liable on his promise to sup-
 v. port the family; and an action would have lain on his
 Parker. promise, though the deed acknowledged a payment in full.
 (*Shepherd v. Little*, 14 John. 210. *Bowen v. Bell*, 20 John.
 338.) By what means the payment should be made, was
 a matter between the father and son. But if there was a
 want of consideration, this was only a badge of fraud, and
 the finding of the jury must conclude. (11 Wheat. 213.)

Talcot, (Attorney-General,) in reply. The principle
 decided here in *Jackson v. Seward*, was affirmed by the
 court of errors. The judgment of this court was not
 reversed upon the point of fraud in law. That principle
 was held inapplicable to the case. An adequate considera-
 tion was paid or secured, and the jury had passed upon the
 question of fraud in fact, which the constitution of that
 court forbade them to interfere with on error. This court
 can act upon the evidence. In the view which the chan-
 cellor took of *Jackson v. Seward*, when it came before the
 court of errors, there was no evidence of fraud, either in
 law or fact. The special verdict was defective, and
 nothing was before the court upon *which they could act,
 though it was otherwise with the supreme court when the
 case was before them on a motion for a new trial, or for
 judgment on the case.

Jackson v. Scott, cited at the commencement of the
 argument, shows abundantly, that a judgment is a lien on
 an interest under a contract to purchase when coupled with
 the possession. The assignment and change of possession
 in that case were intermediate the judgment and the exe-
 cution. That does not vary the principle. Some estate of
 the predecessor must have been sold and passed upon the
 execution, or the purchaser could not have recovered pos-
 session. The judgment must have been a lien. *Jackson*
v. Graham, (3 Caines, 188,) is that the purchaser of a
 defendant's interest at sheriff's sale comes into the defend-
 ant's place, acquires his rights, and becomes subject to his

liabilities; and it is not for the real owner to question the change of possession, as between the judgment debtor and purchaser. The purchaser cannot set up any defence against the owner beyond what the debtor could have done. If there be an equitable estate in the debtor, that may be sold. It is said there can be no lien by judgment except on a freehold estate. But what is a freehold? It may be a life estate, or any uncertain estate in lands or tenements. If there be such an estate as would descend to the heir, is it not a freehold estate? There need not be, as supposed on the other side, a seisin of the whole beneficial interest, to constitute a freehold. A seisin for life only makes a freehold, yet there is a lien in such case, by judgment against the tenant for life. The alleged seisin of the Holland Company in this case, has certainly no existence, any more than the seisin of the state in *Jackson v. Scott*.

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Curia, per SAVAGE, Ch. J. Two interesting questions arise out of this case, which I shall briefly discuss in the order in which they present themselves. They are,

1. Had Jeremiah Parker an interest in the land upon which the lien of the judgment could attach?

2. Was the assignment fraudulent?

1. By our statute, the lands, tenements and real estate of every defendant in a judgment obtained in a court of record, are liable to be sold; and such judgment is a lien upon them. (1 R. L. 500.)

Were the premises in question the real estate of Jeremiah Parker by virtue of the contract?

The term *estate* is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership down to naked possession. It is the possession of lands which renders them valuable, and the quantity of interest is determined by the duration and extent of the right of possession. *Real estate*, therefore, includes every possible interest in lands, except a mere chattel interest.

The possession of lands is an interest which may be sold

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NEW YORK, on an execution against the possessor; [1] (3 Caines, 189; May, 1823, 16 John. 192;) and in an action of ejectment against such possessor, he cannot show title in another. (3 Caines, 189.) The estate which is the subject of a sale in execution must be a legal estate. A judgment at law is not a lien on a mere equitable interest in land: [2] and the execution under it will not pass an interest which a court of law cannot protect and enforce. There must be either an interest known and recognized at law, or an equitable title within the purview of the statute of uses. (1 John. Ch. Rep. 56, 7.)

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If the naked possession of land is such an estate, upon which the lien of a judgment will attach, surely the possession, coupled with a right to that possession, being a greater estate and a legal estate, may also be bound by a judgment. A mere equity indeed cannot be sold; (5 Cowen, 485;) but an equitable interest, coupled with the possession, may be sold on execution. Thus the interest of the mortgagor or mortgagee in possession, is bound by a judgment, and may be sold: but out of possession, neither has an interest upon which the lien of a judgment can attach. In the case of *Jackson v. Scott*, (18 John. 94,) it was decided that a person in the possession of land under a contract for the purchase and sale of it, has an interest in the land which may be sold on execution. [3]

[1] *Griffin v. Spencer*, 6 Hill, 525.

[2] *Talbot v. Chamberlain*, 3 Page 219. *Grosvenor v. Allen*, 9 *id.* 74. *Kellogg v. Kellogg*, 6 Barb. 117. See also, 2 R. S. 4th ed. 153, § 4.

The only remedy of the creditor to reach the interest of the debtor in a contract for the purchase of land, is by filing a bill in equity, after he has exhausted his remedy at law, for the recovery of the debt by the return of an execution unsatisfied. *Grosvenor v. Allen*, 9 Page 74.

[3] Although it has been held (*Jackson v. Scott*, 18 John. 94. *Jackson v. Parker*, *supra*.) that a person in possession under a contract for the purchase of land, had a real estate bound by judgment and liable to be sold on execution. It was an equitable interest, coupled with possession. But the words of the Revised Statutes (2 R. S. 4th ed. 153, § 4,) are broad enough to reach that case; and it could not probably be withdrawn from the statute, and those former decisions restored, unless the possession rested upon some specific agreement, for a limited time, giving to the possession the interest and character of a chattel real. See 4 Kent, † 437, note a.

That case was much like the present ; and I think the two are not distinguishable unless upon the ground of fraud. In that case the facts were the following : in the spring of 1817, the title was in the people of the state. The premises were sold by the surveyor general to Elijah Scott, and a certificate was given him by which he would be entitled to a patent on complying with the conditions of sale. A judgment had been docketed against Scott before this purchase from the state. In August, 1817, Scott assigned the certificate to the defendant who was his son-in-law, who went into possession of the premises. In May, 1818, an execution was issued on the judgment against E. Scott, and the premises sold, and the purchaser at sheriff's sale brought ejectment. Spencer, Ch. Justice, says the only question is, whether, as E. Scott had only the possession of the premises, with a contract from the surveyor general entitling him to a conveyance on the payment of certain sums of money which yet remain due, he had such an interest as might be levied on and sold on execution. He adds, that whether E. Scott was seised or not, was not the subject of inquiry ; for if not seised, he had a chattel interest liable to be sold. In that case, the transfer was fraudulent ; so that the court seem to have put it on the same ground as if E. Scott had been in possession. The chief justice then says, we have decided that a mere equitable interest cannot be sold on execution ; but if connected with the possession of the land, the legal interest, of which possession is evidence, may be sold. The 7th John. 206, is referred to for this principle ; but the decision there was under the statute of frauds. It was there held, that an agreement to sell and deliver possession of lands must be in writing ; and possession must be considered an interest in land, within the meaning of that statute. In Jackson v. Scott, the chief justice says, " The purchaser acquires all the debtor's legal rights ; and possession is a legal right." It becomes a different question, he says, whether a court of equity will enforce an equitable interest which the debtor had in the land at the instance of the purchaser. This remark probably had relation to the

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case of *Bogart v. Perry*, (1 John. Ch. Rep. 52, and 17 John. 351, on appeal,) in which the chief justice had shortly before delivered the unanimous opinion of the court of errors, affirming the decree of the chancellor. That case was as follows: Atkinson being the owner of a lot of land, contracted with Birdsall to sell him 296 acres for a certain price, part of which was paid, and Birdsall took possession. Birdsall contracted with Smith to sell him 200 acres out of the 296. Smith was to pay the balance due to Atkinson on Birdsall's contract. He (Smith) took possession of the 200 acres, and made large improvements, and erected buildings. While he was in possession under the contract, Harrison recovered a judgment against him, which was docketed on the 19th of October, 1808. In May or June, 1809, Smith contracted to sell the 200 acres to Perry. Perry also purchased of Birdsall his part of the contract, being 96 acres. He paid Atkinson what was due, and surrendered up the contract and took a deed for the whole, the legal title never having passed out of Atkinson. While the possession remained in Smith, and before he sold to Perry, an execution was issued on Harrison's judgment, and Smith's interest sold by Birdsall, who was sheriff of Seneca county, and purchased by the plaintiff Bogart, for \$30. Bogart tendered to Perry the money and interest which he paid to Atkinson, and demanded a deed. Perry afterwards sold to Van Tuyl, to whom Bogart made a like tender and demand. Notice to Perry and VanTuyl was charged in the bill. The chancellor says Smith had no interest in the land on which the judgment could attach, or the execution operate. There had been a default in payment to Atkinson; and it is not certain that Birdsall or his assignee (Smith) would have been entitled to a specific performance of the contract. But the mere right in equity that Smith, as assignee of Birdsall, might have had against Atkinson under the contract, was not the subject of a judgment and execution as "real estate." The chancellor thought the case different from that of a mortgagor in possession. When the cause came before the court for the correction of errors, Chief Justice Spencer says, the single

question in this case is, whether Smith had such an interest in the land contracted for with Birdsall, and which the latter had contracted for with Atkinson, as was liable to be sold on execution, or as was bound by the judgment in favor of Harrison? He then proceeds to show that it was not a case in which the *cestui que use* is considered the real owner, and whose interest may be sold on an execution. He concludes by saying that Smith never having paid Atkinson the money due him, had but a mere equity in the lands, which could not be reached by execution.

This case was decided in March, 1819, on appeal; and the case of Jackson v. Scott was decided in May, 1820; and the learned chief justice who delivers the opinion in both, understood the two cases not to be at variance, and evidently, in the last case, considered the question in the first to be, whether a court of equity would enforce an equity in favor of Smith at the instance of Bogart, a purchaser of Smith's equity at sheriff's sale. If, however, the court in Jackson v. Scott were correct in saying that the interest of Scott under the surveyor general's contract might be sold, it must be incorrect to say that Smith's interest while he was in possession, was not also the subject of a sale. The only difference is, that Scott had contracted with the state, and Smith had, through Birdsall, contracted with Atkinson. In both cases the owner retained the fee, and the defendant in the judgment had the possession, and an equitable claim to the legal title on performing certain conditions.

I prefer following the case of Jackson v. Scott, because it is in this court. Bogart v. Perry was in chancery. Had Jeremiah Parker remained in possession till this suit was brought, there could be no doubt. The case then would be exactly the case of Jackson v. Graham, (3 Caines, 188.) Where the defendant in the execution, says Mr. Justice Woodworth, (Jackson v. Town, 4 Cowen, 602,) is the possessor, it is of itself sufficient; for actual possession is *prima facie* evidence of a legal title. He cannot show title in another; for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will

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be a tenant also, and estopped in a suit by the landlord from disputing his right in the same manner as the original tenant. In the case then before the court, Eleanor Town, the defendant in the execution, had left the possession of the premises several years before the judgment against her, and had conveyed to her daughter before the cause of action accrued against herself; and no title but possession had been shown. Speaking of the plaintiff's deed under the sheriff's sale, the judge remarks, "His deed is necessarily inoperative unless the judgment was a lien; and that can not be unless there is a legal or equitable seisin. E. Town having neither, nothing could pass by the sale to the plaintiff."

My conclusion upon this part of the case is, that possession being an interest in lands, a judgment becomes a lien upon it, and it may be sold upon execution, and that the defendant himself may be turned out in action of ejectment, and it seems to follow that the possession may be recovered of any one who takes that possession with notice of the judgment. The assignee, with notice, stands equally in the character of *quasi* tenant with the original defendant. But if the possession under contract is such an estate that a judgment becomes a lien, it is immaterial whether the assignee had actual notice or not; the docketing of the judgment is of itself notice. The interest of the party in possession is not a mere equity, like the interest of a mortgagor out of possession. The landlord cannot be injured; for whoever is the possessor, the landlord's rights are the same; and it is equal to him whether a third person is assignee of the contract, by an instrument under seal, or by operation of law.

2. But the consideration of the second point may relieve this case from all embarrassment. Was the assignment fraudulent either in fact or in law? So far as the defendant, Albert Parker, was influenced by motives of filial duty in undertaking to support the family of his profligate father, he should be commended; but if one object was, as some of the witnesses stated, to prevent Cary and Davis from taking his father's farm in satisfaction of their honest

demand, such object is fraudulent. But it is perhaps unnecessary to impugn the motives of the defendant. If the object was purely to support his mother and the family, and that was to be done by means of his father's property, which his creditors had a right to have appropriated to the payment of his debts, then the assignment was fraudulent in law.

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Had the father continued in possession, it is clear from the cases of *Jackson v. Graham* and *Jackson v. Scott*, that the plaintiff must have recovered it. It has been decided that a "failing debtor may prefer one creditor, or set of creditors by an assignment of his property; but if, in that assignment, a provision is made for the debtor or his family, the whole assignment is void. (*Mackie v. Cairns*, 5 Cowen, 54.) It is in evidence that both the Parkers knew of this debt and spoke of it; and of their determination that the creditors should not have the farm; and as no other consideration is pretended but the support of the family, it seems to me the assignment is fraudulent and void as to creditors. If I am correct in this position, then the case is precisely within that of *Jackson v. Scott*, and the plaintiff is entitled to recover.

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I am of opinion that a new trial must be granted, with costs to abide the event.

New trial granted.

JACKSON, ex dem. LOOF and others, against HARRINGTON

EJECTMENT, for part of military lot No. 43, in the town The recital of a deed in a bond is evidence of the deed, even against the obligee and those claiming under him, especially if he or they introduce it in evidence on their part; and the deed need not be produced, or its absence accounted for. [1]

An outstanding title in a person other than the lessor of the plaintiff in ejectment, is sufficient to defeat his recovery, though the defendant do not claim under that title.

And this, it seems, though the title be outstanding in the trustee of the lessor.

When a re-conveyance from a trustee will be presumed.

[1] But in such a case, the possession of the bond must be traced to the possession of the obligee. *Jackson v. Brooks*, 8 Wen. 496. Such recitals are received as primary proofs of other instruments, even of records. Post 129. See further 1 Cowen & Hill's Notes to Phil. Ev. 380. *Lee v. Clark*, 1 Hill, 56.

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of Sempronius, in the county of Cayuga, tried at the circuit in that county, January 23d, 1827, before THROOP, C Judge.

On the trial, the plaintiff proved a patent from the state to one Schreeder for the whole lot.

He then produced a witness who proved a deed in fee of the same lot from the patentee to C. Loop, the ancestor of the lessors of the plaintiff, which was lost. By his (the ancestor's) death, the title would have descended upon the lessors; but the same witness who proved the deed to their ancestor also proved by parol that C. Loop afterwards conveyed the lot to one Jackson, upon an agreement that Jackson should get possession of the land at his own expense, and convey one half to the grantor, C. Loop. A bond from Jackson to C. Loop was also produced and given in evidence reciting the conveyance to Jackson, and that Jackson was to trace the title with all convenient speed, and if in him, by virtue of the deed from C. Loop, then to re-convey one half. This bond was dated December 30th, 1797. It did not appear whether Jackson ever took possession or not, nor whether he ever did any thing to recover the land. He died many years ago in the state prison.

The plaintiff resting his cause on the above proof, the judge nonsuited him, on the ground that he had shown a title out of the lessors of the plaintiff, in Jackson, who was not a lessor.

J. A. Collier, for the plaintiff, now moved to set aside the nonsuit and for a new trial, on the ground that the deed to Jackson was not produced at the trial, nor its absence accounted for. Neither the parol evidence nor the recital in the bond were therefore admissible or competent to prove it. (6 Mod. 45. 2 Lev. 108. Mod. Cas. 44, 5. 2 Serg. & Rawle, 455.)

But if otherwise, he said, a re-conveyance should be presumed after such a lapse of time, and nothing done under the deed. (3 John. 387. Bull. N. P. 110. 2 John. 226 4 Cowen, 587, 598. 7 Cowen, 187. 1 R. L. 72, 74.

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3 John. 216. 16 id. 199. 4 Binn. 240. 5 Cowen, 99. 4 NEW YORK,
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D. Kellogg, contra. The recital in the bond was full and complete evidence of the deed. (*Penrose v. Griffith*, 4 Bin. 231.) This was the plaintiff's own evidence. The indentment is, that the defendant held under the true owner till the contrary appear. (9 John. 167.)

Curia, per SAVAGE, Ch. J. I am inclined to think the judge was right. The testimony of the plaintiff's witness showed the existence of the deed; and the bond, also being the plaintiff's evidence, showed the title out of the lessors of the plaintiff.

It is said Jackson was but the trustee of Loop, and had not such a title as a stranger can set up. Whether the defendant was an intruder, or claiming title, does not appear. No evidence was produced by him. He had no opportunity of *showing how he possessed, or under what claim, as the judge nonsuited the plaintiff.

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But the question is not whether this is such an outstanding title as the defendant could set up for himself, to show his own right; but whether the plaintiff himself had not shown the fee out of his lessors. If Jackson was a trustee, still, at law, the legal estate must prevail, which is in the trustee.

The strongest ground for the plaintiff is, that Jackson being long since dead, and 30 years having elapsed since the deed to him, an extinguishment of the trust by a re-conveyance should be presumed. But can this be? If such re-conveyance had been made, probably the bond produced would have been cancelled. Its existence rebuts the idea of a re-conveyance, if it could otherwise prevail.

I think the nonsuit was right, and should not be set aside.

Motion denied.

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ARMSTRONG *against* WHEELER.

In covenant by a lessor, against one as assignee of the lessee, general evidence will support the action; as that the defendant is in possession, or has paid rent, or claims and offers to assign as his own, or [*89] that he bargained with the lessee and paid a consideration and went into possession, &c. or any other acts from which an assignment may be inferred.

This may be rebutted; as by showing that the defendant is an under tenant of the lessee.

And if he is charged as assignee of the whole, but is in truth assignee of only part, this is a variance.

But where evidence enough is given, on a declaration against him as sole assignee, to

charge him *prima facie* as assignee, as that he bargained with the lessee and paid a consideration, and has been in possession for several years, though part of the time in common with another, but claimed the sole title, this is not rebutted merely by showing an actual assignment from the lessee to the one with whom he (the defendant) possessed in common.

The assignee is liable for covenants broken only while he continues assignee; and he may discharge himself of liability for any subsequent breaches, by assigning to another.

ERROR from the Dutchess common pleas. The plaintiff below, Armstrong, declared in the court below in covenant for rent against the defendant there, Wheeler, as assignee of Jacob Loop, to whom the plaintiff below had leased certain premises, reserving an annual rent of ten dollars. The defendant below pleaded that he was not assignee of Loop; on which fact the plaintiff below took issue.

On the trial, the plaintiff below proved the lease to Loop in 1812; and that in 1815, '16 or '17, the defendant purchased the lot from Loop for a one horse waggon, and had *been in possession ever since, either by himself or as landlord, except one year. This proof was by parol. Edward Livingston and the defendant below occupied jointly from the spring of 1818 to the spring of 1819. The defendant below had frequently, since the occupation by Livingston, offered to sell the lot.

The defendant below produced the original lease to Loop, with an assignment on it to Edward Livingston, dated the 12th of June, 1818. It further appeared, that Livingston came to Red Hook, in the spring of 1818, and, as was reputed, purchased all the defendant's real estate, including the lot in question. That he built a barn on this lot, which was occupied by Livingston and the defendant below, till the spring of 1819, when Livingston left Red Hook. Wheeler, the defendant, continued in the occupation of the barn and lot, till the fall of 1822, when he removed the barn. In 1823, the defendant below let the lot on shares, and received his share of the produce, and of the crop of rye, in 1824.

The court below charged the jury, that Livingston was the legal assignee; and the mere occupancy of the premi-

case, by the defendant below, was not sufficient to charge him as assignee. The plaintiff below excepted, and the jury found a verdict for the defendant.

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Armstrong
v.
Wheeler.

J. L. Wendell, for the plaintiff in error.

S. Sherwood, contra.

Curia, per SAVAGE, Ch. J. There is no question arising upon the pleadings. The declaration charges, in the usual form, that after the making of the lease, all the estate, interest and claim of the lessee, by assignment, came to and vested in the defendant. This fact is denied in the plea, and issue is taken upon it; and whether the evidence supports this allegation, is the only question.

Where the action is brought against the defendant, as assignee of a term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which an assignment may be inferred, as that the defendant *is in possession, or has paid rent. [1] The defendant may show that he is not assignee; but only under-tenant to the lessee. (2 Ph. Ev. 89. 2 Stark. Ev. 437.) [2] If the defendant is assignee of part of the estate, and is charged as assignee of the whole, the variance will be fatal. (Cowp. 766.) [3] The assignee is only liable for covenants broken, while he is legal assignee; and he may discharge himself of his liability for any subsequent breaches, by making an assignment to another. (1 B. & P. 22. Dougl. 461, 2. 3 Burr. 1272.)

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The evidence in this case is sufficient to warrant the inference of an assignmeht. Both the defendants below and the lessee declared that the defendant below had purchased, and the waggon was delivered as the consideration of the purchase. This was attempted to be rebutted by the actual assignment from Loop to Livingston. The evidence on that subject affords the presumption, that the assignment was the consummation of a contract of sale between the defendant and Livingston. He (Livingston)

[1] *Van Ranseller ex'rs v. Gallup*, 5 Denio, 454, 462.

[2] 3 Phil. Ev. 3d ed. 150, 151. 12 Wen. 556. 2 id. 487.

[3] As to the pleadings, see farther, 3 Denio, 135.

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purchased from the defendant all his real estate, as was reputed, in 1818; and left the place in 1819. The defendant was continually in possession, and after Livingston's departure, exercised acts of ownership as before Livingston came. He rented out the lot as his own, and received the rent. He offered to sell it as his own, not as agent for Livingston. This testimony so far from showing the defendant a sub-lessee or an agent, is *prima facie* sufficient, and, being uncontradicted, conclusive to show the defendant an assignee.

In my judgment, therefore, the court below erred, and their judgment should be reversed.

Judgment reversed.

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*HOWLAND *against* SQUIER, sheriff of Seneca.

Under a single count for an escape, and plea of voluntary return, the plaintiff may, without a new assignment, prove a single escape on any day before suit bro't electing which; and the defendant may then show a return into custody, &c. before suit, and apply his plea to such return.

But though the plaintiff has not newly assigned, the defendant can not show a

previous escape and return, and defend himself by setting this up as the escape in question. A voluntary return, in escape against the sheriff, can not be given in evidence under the general issue.

DEBT for an escape; tried at the Seneca circuit, January 15th, 1828, before THROOP, C. Judge.

The declaration contained one count, charging the defendant with the escape of one Phinehas Collver, from a *ca. sa.* on the 31st July, 1826; Collver being charged in the execution thereon at the suit of the plaintiff.

The defendant pleaded, 1. *Nil debit*; 2. That the escape was without the consent of the defendant, and that before the commencement of this suit, the prisoner returned into custody, and remained, and still is a prisoner at the suit of the plaintiff. To these pleas the plaintiff replied, and took issue. To the second plea he tendered an issue upon the fact of Collver's return into custody.

On the trial, the plaintiff proved the prisoner, Collver, off the limits on the 12th and 26th of August, 1826.

The defendant objected that but one escape could be proved, and that the plaintiff should elect which he would

rely upon. The plaintiff elected to rely upon the escape of the 26th of August.

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The defendant, to support his second plea, offered to prove, that before the 26th of August, viz. on the 13th of August, Collver escaped without the knowledge of the defendant, and on the same day returned into custody. This was objected to, on the ground that no return could be shown to any other escape than the one proved; and the judge rejected the evidence.

The defendant then offered, under the general issue, to prove a voluntary return after the escape of the 26th of August. This evidence was objected to, and rejected, on the ground that such a defence must be pleaded, or notice must be given with the general issue; and the plea or notice must be supported by affidavit. The defendant's counsel excepted to these two decisions; and the plaintiff had a verdict.

S. A. Foot, for the defendant, now moved for a new trial.

D. Cady & Talcott, (attorney general,) contra.

**Curia*, per SAVAGE, Ch. J. Unless there is some magic in the plea of a voluntary return, this is a very plain case. The plaintiff declares setting out one escape; the defendant pleads to that escape, a voluntary return before suit brought. On the trial, the plaintiff proves an escape on the 26th of August, 1826, and the defendant answers by saying, that thirteen days previous, he (the prisoner) escaped, and was absent eight hours, and then returned again on the same day into custody.

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This is clearly no defence, unless there is a technical difficulty arising out of the state of the pleadings. It is argued by the defendant's counsel that the plaintiff should have new assigned, and he refers to 1 Chit. Pl. 603, where it is said, in an action for an escape, if the defendant plead a negligent escape and voluntary return, the plaintiff should new assign a subsequent escape. Chitty cites 1 B. & P.

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413, (*Griffiths v. Eyles*.) That case has been recently under the consideration of this court; and one point there adjudicated was held not to be law in this state, if in England. (6 Cowen, 732, *The Middle District Bank v. Deyo*.) This last case also is now referred to as establishing the course to be, that where the defendant pleads a voluntary return, the plaintiff should new assign. In that case, the declaration contained three counts all alike, except that the escapes were alleged to be on different days. To each count the defendant pleaded a voluntary return, and that the defendant kept the prisoner until he assigned him to his successor; to which the plaintiff replied that the defendant did not keep the prisoner in manner and form, &c. The plaintiff proved five escapes before suit brought, though when the suit was commenced the prisoner was in custody of the new sheriff. The judge at the trial adopted the rule laid down in *Griffiths v. Eyles*, and instructed the jury, that if, after the escapes in the declaration and the returns of the prisoner, he had made other escapes, the plaintiffs were entitled to recover. We decided that, under those pleadings, the defendant was at liberty to show a voluntary return after every escape proved, and that the defence was complete on proving a voluntary return before suit brought, and that the prisoner was in custody when the action was commenced. Mr. Justice Woodworth, in giving the opinion of the court, speaks of the pleadings, and *says that the defendant is not bound to do more than to give an answer to the escapes in the declaration.

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Again, it is there said that the day is not material, and that the defendant may apply his plea to such escapes as he thinks proper, and that this latitude might have been restricted by the replication relying upon certain identical escapes. And again, if the plaintiffs relied upon a subsequent escape, they should have new assigned.

These remarks were all just, as applied to that case, or any other, where more escapes are proved and relied on than are set forth in the declaration. But when the judge says that the defendant may apply his plea to such escape as he thinks proper, he did not mean to say, nor can such

a construction be fairly given to his language, that a defendant, under a plea of voluntary return, might justify one escape by showing another and previous escape, and a return, though when suit brought, he was at large. The whole argument of the judge in that case is to show that a return before, and an imprisonment when the suit was brought, is a bar. Nor is there any thing in that case to show the necessity of a new assignment, where but one escape is alleged or proved.

If the doctrine contended for by the defendants be correct, the plaintiff must always new assign after a plea of voluntary return or recaption; and if the same plea should be put in to the new assignment, the plaintiff must new assign again, and so on *toties quoties*; for the plaintiff knows not how often the prisoner may have escaped previous to the escape for which he has brought his action.

The rule undoubtedly is, that the defendant may apply his plea to the last escape, if his proof will support it; and he might have done so in this case. That he did not offer to do. But he made another offer, which was to show a voluntary return under the plea of the general issue without notice, when he had a plea which would have justified the evidence. This was properly rejected, such evidence being inadmissible under the general issue.

The motion for a new trial must be denied.

New trial denied.

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*JACKSON, *ex dem.* PARKER and OTHERS, against PHILLIPS.

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EJECTMENT for lot number 75, Granby, (formerly Hannibal,) tried on the 29th day of December, 1826, at the Oswego circuit, before WILLIAMS, Circuit Judge.

The statutes
(secs. 17, ch. 1
and ch. 44, 1
R. L. 209,
211,) requir-
ing certain

deeds, &c. of land in the military tract to be deposited in the Albany clerk's office, by May 1st, 1795, or that they should be void as against subsequent purchasers, &c. does not extend to the grantor or his heirs. A deed not deposited, is good as against him and his heirs.

A deed relating to these lands was found in the clerk's office of Cayuga, in December, 1826, dated June 4th, 1790, but not recorded there. It was acknowledged June 26th, 1790,

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At the trial, the plaintiff gave in evidence the exemplification of a patent from the people, &c. to Abraham Barnes, of *the lot in question, bearing date July 9th, 1790, and which passed the secretary's office on the same day. He then introduced as a witness Elizabeth Barber, who testified that she was the wife of Abraham Barnes, (the patentee,) who was a soldier in the revolutionary war; that she became acquainted with him in 1784, was married to him the same year, and had by him five children, one of whom died without issue in 1811. The others, viz. David Barnes, Eliza-

and endorsed as recorded in the secretary's office, April 18th, 1795; and endorsed also generally, "Registered April 29th, 1795." *Semble*, that it shall be taken, *prima facie*, to have been deposited in the clerk's office at Albany, before the 1st of May, 1795.

The form of a certificate of the proof to be endorsed on a deed, in order to make it evidence, and entitle it to be recorded, under the act of 1788. (*Sess.* 11, ch. 44. 2 Greenleaf, 99.) It need not state that the officer knew the witness, or that the witness knew the grantor.

A deed of military land having been duly acknowledged and recorded in April, 1795, (not according to the act of 1813,) so as to make it evidence according to the existing laws in 1795, may be read in evidence now, though not acknowledged or recorded pursuant to the act of 1820, (*sess.* 43, ch. 245, § 3.) and though that act *literally* prohibits all deeds dated before 1797 from being evidence, unless acknowledged or proved according to the statute of 1813, (*sess.* 36, ch. 97, § 1.)

Form of a certificate of acknowledgment to be endorsed on a deed under the statute of 1788, in order make it evidence, and entitle it to be read, where the grantor is unknown to the officer taking the acknowledgment. The name of the witness proving the identity of the grantor need not be given in the certificate. *Conceded by the counsel who first objected the want of such name.*

Note, the act does not, in terms, require any proof of identity.

Form of a certificate of acknowledgment to be endorsed on a deed, in order to make it evidence, under the act of 1813, (*sess.* 36, ch. 97, § 1,) taken before a first judge of the degree of counsel in the supreme court.

The certificate of acknowledgment taken before a county judge of the degree of counsel, &c. proves, *per se*, the deed out of his county, and entitles it to be recorded there, without the certificate being authenticated by the clerk of the county in which the judge resides.

Proof by comparison of hands, i. e. the juxtaposition of two writings, in order to ascertain whether both were written by the same person, is inadmissible. Witnesses cannot testify from such comparison alone, nor can the writings be submitted to the jury.

Form of a certificate of acknowledgment to be endorsed on a deed, in order to make it evidence under the act of 1813.

It is not necessary, in such certificate, that the deed should be proved by the original subscribing witness. And where there was only subscribing one witness, and he did not prove the deed, but the party to the deed acknowledged the execution before another witness at a subsequent period, who then subscribed his name as a witness; *held*, that he might prove these circumstances before the judge, this being equivalent to an original execution in the presence of the witness. [1] These matters appearing in the certificate, *held* sufficient, and that the deed might be read.

Semble, that adverse possession of land by an alleged grantee, in a deed, and those claiming under him, though not continued 20 years is entitled to some weight in showing the genuineness of the deed against proof to impeach it.

Otherwise, it seems, where the question is simply one of adverse possession, set up to bar an entry under the statute of limitations, and there, it seems, where there is a succession of tenants, the chain must be unbroken for 20 years.

[1] But see post 113, n. 1. Norman v. Wells, 17 Wen. 137

beth Barnes, Joseph Barnes and Loisa Baker, the wife of Isaac Baker, (all lessors of the plaintiff,) are now living. That Abraham Barnes died on the lot in question in August, 1806. No attempt was made to show title in Parker, the other lessor.

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The plaintiff then proved the defendant, Asa Phillips, in possession of the lot at the commencement of the suit, which was at August term, 1825, and rested his cause.

The defendant also claimed title under Abraham Barnes, (the patentee,) who was a gunner in the New York regiment of artillery in the service of the United States, during the revolutionary war. To support his claim, he offered in evidence a quit-claim deed from Abraham Barnes, described in the deed as a gunner in the late second or New York regiment of artillery in the service of the United States of America, to Theodosius Fowler, of the city of New York, conveying to Fowler, his heirs, &c., all the right, title, interest, claim and demand which the said Barnes then had, and all the right, title, interest, claim and demand which he, his heirs, executors or administrators at any time thereafter might have to all the land which he was entitled to, or his representatives might be entitled to, from the state of New York, for his services in the army of the United States of America, as a gunner, for and during the war with Great Britain. There was also contained in the same instrument a power of attorney from Barnes to Fowler, to procure the land by such means as might be necessary, but to be for the sole benefit of Fowler. This deed bore date the 4th day of June, 1790, and purported to have been executed in the presence of Isaac Bronson and Jonathan Wells, as witnesses. On the back of deed was the following certificate of proof:

"State of New York, ss. Be it remembered, that on the 26th day of June, 1790, before me, James M. Hughes, one of the masters in chancery, personally came and appeared Isaac Bronson, one of the subscribing witnesses to the execution of the within deed, who, being duly sworn, deposeth and saith, that he was present and saw Abraham Barnes, the person whose name is subscribed, and seal to

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NEW YORK, the same, duly execute the same as his own voluntary act
May, 1828. and deed, for the uses and purposes therein mentioned; and
 Jackson I having inspected the same, and finding no material erasure
 v. and interlineations therein, except an obliteration on the
 Phillips. fourth line thereof, do allow the same to be recorded. James
 M. Hughes, master in chancery."

On the back of the deed was also a minute in the words and figures following: "Recorded in the secretary's office of the state of New York, in book of deeds endorsed M. R. G., page 11, this 18th day of April, 1795. Lewis A. Scott, Sec'y."

The following words and figures also appeared on the back of the deed: "Registered April 29th, 1795."

Daniel Kellogg, Esq., counsel for the defendant, testified that he was appointed a special agent by the clerk of Cayuga county, to take charge of the deed, and to produce it on the trial of this cause; and that he received the deed from the clerk of Cayuga county the day before; and had seen it on file in the clerk's office of that county two or three times.

The defendant also read in evidence a stipulation in writing, entitled in this cause in the words and figures following, viz: "Whereas the clerk of Cayuga county has made Daniel Kellogg, Esq., a special agent to take charge of a certain filed deed purporting to be executed by Abraham Barnes to Theodosius Fowler, for lot No. 75, formerly Hannibal; and whereas the said deputation has been accepted by said Kellogg, now it is hereby stipulated and agreed, that said deed shall be produced on the trial of this cause at the present circuit, upon the request of the plaintiff's counsel, by said Kellogg, and also that the same was found by the present clerk of Cayuga on the files of his office; intending that all the advantage may be given to the plaintiff from the *production of said deed, which could arise to him if the clerk himself should produce it, and he sworn to its being filed. Dec. 29th 1826. Daniel Kellogg, deft's counsel. D. B. Noxon, counsel for plff."

The reading of this deed in evidence was objected to by the plaintiff's counsel, because it had not been sufficiently

proved; that the certificate of proof was defective, it not stating that the officer knew the witness, or that the witness knew the grantor, and because there was no proof of its having been deposited in the clerk's office at Albany, in pursuance of the statutes of 1794, and because the proof of its being a filed deed was defective. His honor, the judge overruled the objections, and suffered the deed to be read in evidence.

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The defendant also introduced an exemplification of the balloting book remaining in the secretary's office, by which it appeared that the patent was granted to Abraham Barnes, was delivered to Capt. T. Fowler, July 9th, 1790, and that Abraham Barnes was a gunner in the New York regiment of artillery.

The defendant next produced in evidence an exemplification of a deed from Theodosius Fowler and Mary his wife, to Nathaniel Olcott, dated 19th April, 1796, for the whole lot in question, acknowledged the same day before James Kent, master in chancery, and recorded in the Cayuga clerk's office on the 12th November, 1796. Also, the exemplification of a deed from Nathaniel Olcott to Joseph Lay, for one equal undivided half of the lot, bearing date April 19th, 1796, acknowledged before James Kent, master in chancery, on the 20th of April, 1796, and recorded in the Onondaga clerk's office on the 18th of April, 1811.

The certificate of acknowledgment on the last deed was in the following words and figures: "State of New York, ss. Be it remembered, that on the 20th day of April, 1796, before me, James Kent, one of the masters in chancery for the said state, personally appeared Nathaniel Olcott, named in the within indenture; and satisfactory proof being made to me, that he was the person within intended, the said Nathaniel acknowledged that he had sealed and delivered the same, as and for his voluntary act and deed, for the use therein mentioned; "and I have inspected the same, and finding no material erasure or interlineations, do allow it to be recorded. James Kent."

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The reading of this deed in evidence was objected to by the plaintiff's counsel, on the ground that the certificate of

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acknowledgment was defective, in not stating who the witness was who proved the identity of the grantor. This objection was overruled by the judge, and the deed was read to the jury.

The defendant next gave in evidence a deed from Joseph Lay to Thomas Ocman and John Yost, for the whole lot, dated May 2d, 1796, acknowledged the 29th of April, 1797, before Henry Van Rensselaer, master in chancery, and recorded in the Onondaga clerk's office, May 5th, 1797.

The defendant then offered in evidence a deed from John Yost and wife to Isaac Jerome, for two undivided fifths of the lot, dated May 10th, 1825, and acknowledged, as appeared from a certificate thereon, before Luther F. Stevens, first judge of Seneca county, a counsellor, &c. and recorded in the county of Oswego, September 23d, 1826.

This evidence was objected to by the counsel for the plaintiff, on the ground that there was no certificate of the clerk of the county of Seneca attached to the deed, showing Mr. Stevens to be the first judge of Seneca county, and authorized to take the acknowledgment in pursuance of the fifth section of the act, (sess. 41, ch. 55, 4 Laws 44, 45, c,) passed March 24th, 1818. This objection was overruled by his honor the judge, who decided, that as the certificate showed Judge Stevens to be a counsellor, &c. there was no necessity for any certificate from the county clerk.

The defendant next produced in evidence a quit-claim deed from Isaac Jerome and wife to him, the defendant, for two undivided fifths of the lot, dated June 2d, 1825, duly acknowledged and recorded July 15th, 1826, in Oswego county.

For the purpose of showing an adverse possession for 20 years, and to impeach the plaintiff's title, the defendant called a witness, who testified as to various acts of possession and ownership by Fowler, in respect to the lot, and by part of *those claiming under him in virtue of the above deeds. The possession under Fowler commenced 35 years before the trial; but it did not appear to have been continued and connected with the defendant; but was interrupted by Barnes' entry. Nor did the possessions under

claim of title appear to have been continued 20 years, by those under whom the defendant now claimed.

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The plaintiff called Elizabeth Barber again, with a view to establish circumstances inconsistent with a fact of the patentee having executed the deed to Fowler. Among other things, she testified, that her husband (the patentee) was a bad writer, but kept a book account, which, being shown to her, she recognized as his, although, on the book being presented to her, she could not read it. She was an aged woman, and had no spectacles. The book had not been in her possession for a year last past, but had been in possession of Giles Howland. The accounts purported to be dated at Stephentown, in 1797, where her husband then lived. She also testified that her husband wrote his surname with a small *b*, and that it was a subject of frequent conversation in the family, and that he spelled his name Abraham; that the name of Abraham Barnes had been cut out of the account book in one place, where he had signed it to a receipt of a settlement by one Cook.

It appeared from the deed offered in evidence by the defendant from Barnes to Fowler, that Barnes' given name was spelt Abraham, and his surname written with a large capital B.

The plaintiff then offered to prove that the said account book was in the genuine hand writing of said Barnes, and that his name appearing therein twice, was written by himself in 1797, and was spelt and written in the manner Elizabeth Barber declared he usually wrote and spelt his name; and that there was no similarity between the hand writing of Barnes in the account book and the signature to the deed.

This evidence was objected to by the defendant's counsel, and rejected by the judge, on the ground that it would be a comparison of hand writing, which he held inadmissible.

*The plaintiff then offered to prove that the part of the account book which appeared to be in the hand writing of Barnes was the genuine hand writing of Barnes, with a view to submit the book and deed to the inspection of the

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NEW YORK, jury, which was also objected to by the defendant's counsel, and rejected by the court.
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After the plaintiff had called a witness, who had seen Barnes (the patentee) write, and who gave an opinion against the genuineness of the signature to Fowler's deed, he (the plaintiff) offered to prove by the same witness, that the hand writing in the account book was the genuine hand writing of Barnes. This was objected to by the defendant's counsel, and rejected by the judge.

Here the plaintiff rested.

The defendant then offered in evidence a lease from John Yost to Abraham Barnes, for a part of the lot in question, how much did not appear, bearing date June 13, 1806, to which the signature purporting to be that of Barnes, was made by spelling his first name Abraham, and writing his surname with a capital B. The lease purported to be executed in the presence of two witnesses, Abraham Hugunin and Peter Hugunin, both living at the time of the trial within the jurisdiction of the court; but neither of them called to prove the execution. The defendant offered it as having been proved in pursuance of the first section of the act of 1813, concerning deeds, (sess. 86, ch. 97, § 1, 1 R. L. 369;) and the certificate of proof endorsed thereon, was in the words and figures following, viz. "State of New York, Oswego county, ss: on the 28th day of December, in the year of our Lord, eighteen hundred and twenty-six, personally appeared before me Abraham Hugunin, to me personally known, who being duly sworn, deposeth and says, that he is personally acquainted with John Yost and Abraham Barnes, the grantors within named and described, and that the said John Yost and Abraham Barnes did acknowledge to him the said Abraham Hugunin, that they did sign, seal, and deliver the within instrument, as their voluntary act and deed, and for the uses and purposes therein mentioned, and that this deponent subscribed his name thereto as a witness at the same time. All which is satisfactory evidence to me of the due execution of said instrument. PETER D. HUGUNIN,

First judge of Oswego county courts."

The reading of this lease in evidence was objected to by the plaintiff's counsel, because the witness mentioned in the certificate did not see the lease executed; and, for aught that appears from the certificate, the acknowledgment made by Barnes and Yost to him, was long after the execution of the lease, which would not be competent proof, where there is a subscribing witness to the lease as here, viz. Peter Hugubin.

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This objection was overruled by the judge, and the lease was read to the jury for the purpose of showing an acknowledgment and acquiescence by Barnes in Yost's title.

The defendant then gave further evidence as to the possession and acts of ownership by those claiming under Fowler. But the possession was not continued for 20 years, nor connected with the defendant.

Here the testimony closed, and the judge in charging the jury, among other things, stated that long possessions according to a title or claim, though they were interrupted and not continued for 20 years, were strong evidence in support of that title; which position of his honor was objected to by the plaintiff's counsel.

The jury found a verdict for the defendant.

A motion was now made, in behalf of the plaintiff, for a new trial.

B. D. Nowon, for the plaintiff. The deed from Barnes to Fowler was not proved to be a filed deed. By the act of January 8th, 1794, (sess. 17, ch. 1, § 1, 1 R. L. 209,) all deeds concerning the military lands, were, previous to the 1st of May, 1794, to be deposited with the clerk of Albany, who was by the 1st of June to deliver them to the clerk of Herkimer. If not deposited, they are to be deemed fraudulent and void against subsequent purchasers and mortgagees. This act, was amended, and the time of depositing enlarged to the 1st of May, 1795, by the act of March 27th, 1794. (1 R. L. 211, 12, § 1.)

*This deed was not registered according to law. The first general registry act was that of February 26th, 1788; (2 Greenleaf's Laws, 99;) the next registry law was the act

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of the 8th January, 1794, (1 R. L. 209,) already cited, and respects military lands only. By this, all deeds executed after the act passed must be recorded, in order to have effect against purchasers. Another general registry act passed in 1813, (sess. 36, ch. 97, 1 R. L. 369.) The 7th section of this act authorizes certain deeds, acknowledged previous to 1801, to be recorded; but it excepts deeds relating to the military tract, which were not deposited with the clerk of Albany previous to May, 1795. By these acts relating to military lands, the deeds, in order to be effectual, must be recorded in the clerk's office of the county of Herkimer, and the identity of the grantor must be shown. (1 R. L. 219.) By the act of February 4th, 1814, (sess. 37, ch. 5, 3 Laws, 9, c,) deeds of military land, executed previous to May 1st, 1797, could not be recorded unless acknowledged according to the 1st section of the general registry act of 1813. And the statute of April 14th, 1820, (sess. 43, ch. 245, § 3, 5 Laws, 248, c,) is peremptory that no deed concerning these bounty lands, executed previous to May, 1797, shall be read in evidence, unless it be acknowledged or proved according to the first section of the act of April 12th, 1813. There cannot be a pretence that this deed does not come within that act. The officer does not certify that he knew the witness, or that the witness knew the grantor. Recording in the secretary's office did not remedy the defect. We are aware it may be said that a vested right to give this deed in evidence, was acquired under the act of 1788, according to which it was acknowledged; and that such right could not be divested by the act of 1820. But the same objection may be made against the act of 1794, and indeed all the provisions of the various acts to prevent frauds in respect to any deeds executed previous to their passage. Yet these statutes have always been acted upon. *Jackson v. Howe*, (19 John. 80,) was the case of a deed duly deposited and properly recorded before the act of 1820 passed. It was holden that such a deed was not affected by the subsequent statute.

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*That is not this case. Here the deed was never deposited and never properly recorded.

The acknowledgment of the deed from Olcott to Lay in April, 1796, being under the act of 1788, is now admitted to be sufficient, although the witness who proved the identity of the grantor was not named.

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But it is insisted that there should have been a certificate that Mr Stevens was the first judge of Seneca county, to warrant the reading of the deed from Yost and wife to Jerome. This is virtually required by the act of March 24th, 1818, (sess. 41, ch. 55, § 5, 4 Laws, 44, 5, c.) By this act, no deed proved or acknowledged before a county judge can be recorded in any county of which he is not a judge, without the certificate of the clerk of his county authenticating his signature. True, by the act of the same session, of April 20th, 1818, (ch. 195, § 1, 4 Laws, c.) judges of the common pleas of the degree of counsel, are authorised to perform all the chamber duties of a judge of the supreme court, of which the acknowledging or taking the proof of deeds is one; but this does not repeal the former act requiring a certificate. They are still local officers; and the principle of the former act applies. The clerks were in danger of being imposed upon by forgeries. This was the evil; and the mischief is not removed by the circumstance that the judge is of the degree of counsel.

It was competent for the plaintiff to prove Barnes' hand writing in his account book, to show the character of his hand, as well as the manner in which he spelt his name, and how he wrote it. It was important to show the dissimilarity between his name and hand writing at the date of his book, and the signature to the deed. It was at any rate admissible as refreshing the recollection of witnesses on the question of hand writing. It was also proper for the jury to make the comparison.

In *Allesbrook v. Roach*, (1 Esp. Rep. 351,) the jury were permitted to compare the signature to the instrument in question with specimens admitted to be the hand of the party who signed; and Lord Kenyon there pronounces distinctly in favor of a comparison of hands. The witness need not always have seen the party write, or corres-

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ponded with him. It has been a long time the uniform practice at the *oyer and terminer* to prove the forgery of bank bills, without the witness either having seen the bank officers write, or corresponded with them. In *State v. Bronson*, (1 Root, 307,) the rule is laid down by the court generally, that comparison of the hand writing of the party is admissible evidence even in a criminal prosecution; and like all other evidence, to be left to the jury. In *Titford v. Knott*, (2 John. Cas. 211, 214,) this court held that a witness was not confined to knowledge from seeing the party write, or corresponding with him; that he might be guided by his knowledge derived from authentic papers in the course of business, or, having in either of these ways acquired some knowledge of the hand, he might fortify his memory by a comparison of hands in court. (*Burr v. Harper*, 1 Holt's N. P. Cas. 420, S. P.) In *Revet v. Braham*, (4 T. R. 497, 1 Phil. Ev. 373, S. C.,) a witness was allowed to speak to hand writing merely from his skill in detecting forgeries. And ancient writings may be proved, and (by parity of reason) disproved by a mere comparison of hands. (1 Phil. Ev. 372, 3, and the cases there cited, Am. ed. of 1820. *Roe v. Rawlings*, 7 East, 282, and note (a) there. 14 East, 327.) In *Jackson v. Vanduzen*, (5 John. 144,) the mark of a witness to a will was proved by comparison; the witness proving it, having seen him make his mark but once.

The lease purporting to have been made from Yost to Barnes, was not sufficiently proved. The certificate of proof was defective, it not appearing that the witness produced to prove the execution, saw the lease executed. He only stated that the parties acknowledged that they executed it; and there was a subscribing witness besides. The statute, (1 R. L. 369, § 1,) is that a deed must be proved by the *subscribing* witness. This must mean the witness who saw the original execution, or witnessed the deed at that time in fact. The proof here is no more than a bare confession of the party that he gave the lease. This is insufficient where there is a subscribing witness. *Fox v. Reil*, 3 John. 477.)

The charge of the judge was incorrect, in saying that long possessions according to a title or claim, though interrupted *and not continued for 20 years, were strong evidence in support of title.

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D. Kellogg, contra. The deed from Barnes to Fowler was proved according to the then existing law, and recorded in the secretary's office according to the law then in force; (2 Greenleaf's Laws, 99;) and it was not competent for the legislature to declare that such a record should not be admitted in evidence. (*Jackson v. How*, 19 John. 80.)

The first act in relation to the proof and recording of deeds given for military bounty lands, was passed on the 8th day of January, 1794, (1 R. L. 209,) which requires all deeds theretofore made, to be deposited with the clerk of Albany on or before the 1st day of May, 1794, or that they shall be adjudged "fraudulent and void against subsequent purchasers for valuable consideration, &c.; and that all deeds and conveyances hereafter to be made and executed of or concerning, or whereby any of the said lands may be any way affected in law or equity, shall be recorded by the said clerk of the said county of Herkimer, &c.; and that every deed and conveyance hereafter to be made and executed of or concerning, or whereby any of the said lands may be any way affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser, &c. unless the same be recorded, &c. before the recording, &c. Provided always, that no such deed or conveyance shall be recorded, unless the same shall be first duly acknowledged by the party who shall execute the same before, &c."

By a subsequent act, passed the 27th of March, 1794, (1 R. L. 212,) the time for depositing such deeds was prolonged until the 1st day of May, 1795.

By the first act, two kinds of deeds are spoken of, viz. deeds then executed at the time of passing the act, and deeds to be thereafter executed. The first were required to be deposited, and the last to be recorded. The deeds, which were filed, were not required to be recorded, and subsequent deeds could not gain a preference although they

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might be first recorded. In speaking of the manner in which "such deeds" should be acknowledged, the legislature evidently had *reference to such deeds as were spoken of in the next preceding sentence, and which were deeds thereafter to be executed.

The next act which can have any bearing upon the deed in question, was passed the 14th of April, 1820, (sess. 43, ch. 245, 5 Laws, 248, b;) by the 3d section of which it is enacted "that no deed, conveyance or writing, relating to the title or property of any lands granted by this state as bounty lands to the officers and troops of this state who served in the army of the United States, executed on or before the first day of May, 1797," (see act of 12th February, 1798. 1. R. L. 216,) "shall hereafter be read in evidence in any court of this state, unless the same be acknowledged or proved according to the provisions of the first section of the act entitled, 'An act concerning deeds,' passed the 12th day of April, 1813; any thing in the seventh section of said act, or any law to the contrary notwithstanding."

This section was evidently intended by the legislature to extend no further than fully to repeal the 7th section therein referred to, which permitted all file deeds acknowledged or proved according to the then existing law, to be recorded and to be read in evidence; the former part of which was repealed by the act of the 4th of February, 1814, (sess. 37, ch. 5, 3 Laws, 9, b,) leaving that part of the 7th section which authorized deeds so acknowledged to be read in evidence, in full force. And such are the constructions which have been virtually put upon the act of 1820, by the decision of this court in the cases of Jackson, *ex dem.* Yates, *v.* How, (19 John. 80,) and Jackson, *ex dem.* Hungerford and others, *v.* Eaton, (20 John. 478.)

But few deeds for military lands were recorded before the 8th day of January, 1794. A vast many were recorded between that day and the 1st day of May, 1795, being the day limited for depositing them with the clerk of Albany, which recording was done for the purpose of preserving the evidence of the titles to the lands, as the deeds were to be placed beyond the control of the

owners. Certificates from the clerk of Cayuga county and the secretary will show this to be true. The practice under that act ought to have great weight in giving it a construction. (Jackson v. Gumaer, 2 Cowen, 567)

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*If the deed was recorded in pursuance of a then existing statute, the legislature could not, by any subsequent statute, destroy the evidence of Fowler's title. His right became vested and could not be taken away.

The deed was proved to have come from the proper office, when it was brought to court by the clerk of Cayuga county ; it was on file in his office ; and the endorsements upon the back of the deed were as much evidence of its having been deposited with the clerk of Albany county, and recorded in the secretary's office, as the endorsement upon a judgment recorded or any other paper, would be of the time of filing or docketing such record or paper, which no person has thought proper to question.

The clerk was required by the act of 1794, to register in a book the names of the grantor and grantee ; and the date of the deed, and his endorsement of having done so has always been taken as evidence of its having been done, and of the time of depositing.

But the lessors of the plaintiff were not *bona fide* purchasers, and they cannot object that the deed was not deposited.

All the lessors of the plaintiff, excepting Parker, are heirs at law of the grantor in Fowler's deed ; and Parker, the other lessor, is not a purchaser.

The certificate of acknowledgment of the deed from Olcott to Lay was sufficient. If it was defective, it was of no consequence, as the deed to Fowler proved a subsisting title out of the lessors of the plaintiff. And the defendant being in possession under color of a *bona fide* title, may set up a subsisting outstanding title in a stranger, to defeat the plaintiff's recovery, although the defendant has no title in himself. (Jackson, ex dem. Dunbar v. Todd, 6 John. 257. Jackson, ex dem. Seeley v. Morse, 16 John. 197. Buller's N. P. 110. Runnington on Eject. 343. Jackson, ex dem. Ten Eyck v. Richards, 6 Cowen, 617.)

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The decision of the court in rejecting the account book and the evidence of comparison of hand writing between Barnes' name to the deed and the hand writing in the account book, was correct.

*Phillips says (1 Phl. on Ev. 371,) "It is an established rule of evidence, that hand writing cannot be proved by comparing the paper in dispute with any other papers, acknowledged to be genuine. The reason usually given is, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance. Another reason for rejecting such a comparison seems to be, that the writings intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose; and they are not likely, therefore, to exhibit a fair specimen of the general character of hand writing."

The latter reason applies with peculiar force in this case; as it appears, the name of Barnes had been cut out of the account book, where he had signed it to a settlement; and the only two places in which his name now appears, are supposed to be those which will best serve the plaintiff's purpose. The book is produced by the party in interest, and why cut out Barnes' name in any place, if he wants to exhibit a fair specimen?

In *Stranger v. Searle*, (1 Esp. Rep. 14,) Lord Kenyon ruled, that a witness should not be allowed to decide on comparison of hands, although in *Allesbrook v. Rosch*, (1 id. 351,) he permitted it, saying he had always been inclined to admit it. And in *The King v. Cator*, (4 Esp. Rep. 117,) Hotham, baron, rejected such evidence, after a very full argument, and much reflection. (See also the cases collected in a note at the end of this volume, Day's edition; and also *Macferson v. Thoytes*, Peak. Cas. 20.)

The case of *Jackson ex dem. Van Dusen and others v. Van Dusen*, (5 John. 144,) does not overrule the former decisions. This was the case of a will, where one of the subscribing witnesses made his mark in a peculiar manner. The witness had seen the person make his mark at another

time, which the witness then had in his possession, and it was accompanied by proof of the declaration of one of the other witnesses in his lifetime, that he and S. W. had subscribed the will as witnesses. Mr. Justice Van Ness says, he does not mean to "controvert the rule, that a comparison of hands is not competent testimony. The witness signed the initial letters of his name S. W.; from the peculiar character and structure of which, he believed them to have been made by Wheeler.

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In *Morewood v. Wood*, (14 East, 328,) evidence of comparison of hand writing was admitted upon the ground that no better evidence could be obtained, as the person whose hand writing was proved had been long since dead; but no objection was made to the testimony.

In *Titford v. Knott*, (2 John. Cas. 211,) Kent, justice, says, "if the witness has no previous knowledge of the hand, he cannot then be permitted to decide it in court from a comparison of hands."

Many of the cases reported, which at first would seem to be in favor of admitting such evidence, are in fact against it; such as proving ancient writings by witnesses who have become acquainted with the manner of a person's signing his name by inspecting other ancient writings, which bear the same signature, and which have been treated and regularly preserved as authentic documents. (*Norris' Peake*, 155.) Such proof is not a comparison of hand writing. But the person has gained a knowledge of the general character of the hand, by having frequently seen the hand writing which is genuine.

The lease from Yost to Barnes was sufficiently proved.

The certificate states that Yost and Barnes acknowledged to the witness, "that they did sign, seal and deliver the within instrument as their voluntary act and deed, &c., and that this deponent subscribed his name thereto as a witness, at the same time; all which is satisfactory evidence to me of the due execution of said instrument."

It is a very common way of becoming a subscribing witness to a deed. The parties sign, and call upon a person within hearing to step in and witness it. This was proba-

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bly done here. At any rate, if the officer was satisfied of the due execution, the court will not look any further. He is the person who interrogates the witness; and after hearing the particulars in relation to the execution, he reduces the testimony to form. (*Jackson v. Livingston*, 6 John. 157.)

Hugenin subscribed his name as a witness, and the court will intend, that it was done at the time of the execution of the lease.

As to the objection, that the certificate of judge Stevens on the deed from Yost to Jerome was not duly authenticated; the judge was a counsellor at law, and took the acknowledgment under his power as a judge of the supreme court at chambers. In such case, a certificate of the clerk is not necessary; and this was held expressly in *Jackson v. Chapin*, (5 Cowen, 485.)

As to the charge of the judge, the counsel referred to *Smith v. Lorillard*, (10 John. 355.)

Curia, per SAVAGE, Ch. J. (after stating the case.) The most important question arises upon the admissibility of the deed from Barnes to Fowler.

The first objection to this deed is, that it was not proved to have been filed, nor deposited, nor registered according to the statute.

One answer is, that a non-compliance with the act in this case, does not affect the rights of the grantee or his assigns. The statute relied upon, indeed, directs that all deeds theretofore executed, &c. should be deposited; and if not, they should be adjudged fraudulent and void against subsequent purchasers or mortgagees for valuable consideration; but not against the grantor and his heirs. The lessors of the plaintiff, in whom any title is pretended, are the children and heirs at law of the grantor.

But another answer, perhaps, may be given, which is, that there is, *prima facie* evidence that the deed was deposited according to the acts of 1794. It was found in the office where it should be, if it was deposited. It was proved, before the time limited for depositing, and

marked, "*Registered April 29, 1795.*" To this there is no signature, but being in the clerk's office of Cayuga county, without explanation, and not being recorded, the presumption being in favor of a legal performance of duty by public officers, the deed must have come from the clerk of Albany, through Herkimer and Onondaga. *(See the acts concerning these deeds collected, 1 R. L. 209 to 218.) In neither of the latter offices could the registry have been made. None was required by law; but in Albany it was.

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I think, therefore, the memorandum on the back was *prima facie* evidence of the deposit having been made on the 29th of April, 1795, which was in time.

The next objection to this deed is, that the proof was defective. The law in force when this deed was executed and proved, was the act of the 26th of February, 1788. By that act, no deed could be recorded without an acknowledgment or due proof by one of the subscribing witnesses. That act does not prescribe the form nor the substance of the certificate of the officer taking the acknowledgment or proof; but merely says that a certificate of the acknowledgment or proof should be endorsed upon the deed. By the same act, a deed duly proved and recorded, or the record thereof, might be read in evidence.

The act of 1813 required that the certificate of the officer taking the proof should contain the names of the witnesses and their testimony; and the act of 1820 prohibits the reading in evidence of any deed for lands in the military tract, unless acknowledged or proved according to the act of 1813. If the statute of 1820 were to receive a literal construction, this objection must be fatal. [1] But in the case of *Jackson v. How*, (19 John. 80,) this court, after a critical examination of these several acts, decided that the

[1] Since January 1, 1830, the former laws of New York, relative to the proof, acknowledgment, and records of deeds &c. are entirely obsolete, as regards conveyances since that time, still they are often drawn in question, when conveyances acknowledged, proved and recorded under them, are sought to be given in evidence. A list of references to those laws and the adjudications under them may be found in 2 Cowen & Hill's Notes to Phil. Ev. 470.

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only operation of the act of 1820, taken in connection with the act of 1814, is to prevent the reading in evidence of an *unrecorded deed*, although it may have been acknowledged in conformity with the existing laws; but which the party has neglected to have recorded in due season. This deed from Barnes to Fowler, having been proved according to existing laws, and duly recorded, is not embraced in the meaning of the act of 1820, and was therefore properly read in evidence.

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The next objection is to the deed from Yoast to Jerome. It is said there should have been a certificate of the county clerk, that L. F. Stephens was first judge of Seneca county, although he was a counsellor, &c. This point has been decided. *Where the proof or acknowledgment is taken before a judge of this court, or a commissioner to perform certain duties of a judge of this court, no certificate from the county clerk is necessary. The first judge of a court of common pleas being a counsellor of this court, is a commissioner *ex officio*; and therefore no certificate is necessary. (5 Cowen, 485.)

The deed from Barnes to Fowler being properly in evidence, and showing a title out of the lessors, they had a right to show that the deed was a forgery by proper testimony and they contended that Barnes' account book was proper for that service, by way of comparison of hand writing. The rule is settled in England, and I believe in this state, that comparison of hands by *juxtaposition* of two writings, in order to ascertain whether both were written by the same person, is inadmissible [1] (1 Stark. Ev.

[1] This rule has been invariably followed by the English Courts: See 4 Esp. 273, a, Day's ed. 2 Cowen & Hill's Notes, 478 et seq. Clement v. Lullidge, 4 Carr. & P. 1. Mutchinson v. Allcock, 1 Bowl. & R. 165. Greaves v. Hunter, 2 Carr. & P. 447. And in the Supreme Court of the United States. Strother v. Lucas, 7 Pet. 763. The same rule prevails in New York. Wilson v. Kirland, 5 Hill, 193. In Hutchins' case, 4 City Hall Rec. 119. A comparison of hand writing by the jury, was not permitted, although both the prosecutor and prisoner consented. See also Haskins v. Stuyvesant, Anth. N. P. 97. But in Rodgers' Adm'r's v. Shaler, id. 109, Spencer J., held that after the hand writing of a party (an intestate) is in evidence, his hand writing to any other instrument may be proved by calling any witness to compare the hand writing proved, with that to be proven, and to state his

654, and 1 Phil. Ev. 428, and the cases there cited.) In some of our sister states the rule is otherwise. [1]

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In *Titford v. Knott*, (2 John. Cas. 211,) Kent, justice, says it is usual for witnesses to prove hand writing from previous knowledge of the hand, derived from having seen the person write, or from authentic papers received in the course of business. If the witness has no previous knowledge of the hand, he cannot then be permitted to decide it in court from a comparison of hands. The same rule is admitted in *Jackson v. Van Duzen*, (5 John. 155,) and where a different practice has obtained with us, I presume it will be found that the comparison, either by witnesses or by the jury, has been by consent. The reason given for this rule, that the jury may not be able to read, is not satisfactory, and at the present day not well founded in fact. A more satisfactory reason is that the specimens produced may be selected for the purpose; and another, that if permitted, these specimens may be contested and examined by others, and thus collateral evidence might be introduced to an inconvenient length, and in the end might not be conducive to justice. The book, therefore, was properly excluded.

There is one other point which it is proper to notice. The certificate of acknowledgment upon the lease from Yost to Barnes is said to be defective, because the witness does not state that he saw the lease executed. The parties acknowledged it in his presence, and he subscribed it as a witness. The witness must prove the execution of the instrument. Is not that done by an acknowledgment from the parties, and an attestation by the witness?

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inference to the jury, the jury not being competent to make such comparison. In England the rule now is, that the court or jury may compare a document, with another *already in evidence*, and from the comparison form a judgment upon the genuineness of the hand writing. *Griffiths v. Williams*, 1 Crom. & Jerv. 47. *Solita v. Yarrow*, 1 M. & B. 113. *Doe v. Newton*, 1 Nev. & P. 4 S. C. 5 Adol. & E. 514. *Doe v. Luckermore*, 1 Nev. & P. 32. S. C. 5 Adol. & E. 703. See also 2 Cowen & Hill's Notes to Phil. Ev. 478, *et seq.*

An exception to the rule, as to a comparison of hand writing, exists in relation to ancient writings. See post 150, N. 1.

[1] See 2 Cowen & Hill's Notes to Phil. Ev. 481, 3.

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A deed takes effect from the delivery ; and if the parties choose to sign their names alone, and then call witnesses before whom they acknowledge the instrument, that is a good execution. [1] And should some time intervene, (years, if you please,) I can see no difference. It is a re-delivery of the deed which then, at least becomes effectual. This evidence will be good and sufficient to prove the deed in a court of law, and therefore is sufficient before the judge or commissioner.

The question of genuineness of the deed was before the jury, upon all the legal evidence on both sides, and they decided in favor of the defendant.

The doctrine advanced by the judge in his charge, becomes altogether immaterial. Were the question one of adverse possession, then I apprehend the possession must be continued by an unbroken chain, where there has been a succession of tenants. That was not the question here ; and I am inclined to think the judge correct, that such a possession as was shown was entitled to some weight in fortifying the title of Fowler and those claiming under him. But whether that be so or not, his deed was legally proved, and there was no sufficient evidence to disprove it calculated to shake the finding of the jury. The motion for a new trial must be denied.

New trial denied.

[1] *Munns v. Dupont*, 3 Wash. C. C. Rep. 32, 42. *Kingwood v. Bethlehem*, 1 Green, 228.

But see *Hollenback v. Flemming*, 6 Hill, 306. *Henry v. Bishop*, 2 Wen. 575. Both these cases assert the doctrine that no one can be an attesting witness who did not subscribe his name as such, at the time the instrument was executed. *Norman v. Wells*, 15 Wen.

END OF MAY TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK,

IN AUGUST TERM, 1828, IN THE FIFTY-THIRD YEAR OF OUR INDEPENDENCE.

BAILEY *against* JOHNSON.

ASSUMPSIT; tried at the Erie circuit, in September, 1826, before BIRDSALL, C. Judge.

The declaration was on a special contract.

A written contract deposited by the parties with a witness in a foreign state, being

out of the jurisdiction of the court, may be proved by the depositary on commission, and need not be produced in court.

An order was to deliver goods to B. In pleading, it was averred that the goods were to be delivered to B. or order; *held*, no variance, the words "or order" not being material, nor set forth as matter describing the instrument.

A written contract, not sealed, may be varied by the parties, on a valid consideration, by parol [1]; and the supplemental agreement may be enforced in connection with the original one; the whole as a single agreement. [2]

An order drawn on a depositary of goods by the owner, to deliver them to a third person, and accepted by the depositary, is a sale of goods according to the terms of the order, by the drawer to the deliverer.

An order on a depositary to deliver goods, is valid without saying *for value received*, or proving value received, especially if accepted by the drawee. It will be intended that the deliverer is beneficially interested, and not a mere agent of the drawer.

Where there is doubt as to the terms of an order in the hands of the party sought to be

[1] Otherwise, if the original contract is within the statute of frauds. *Blood v. Goodrich*, 9 Wen. 68.

[2] See *Mead v. Degolyer*, 16 Wen. 632.

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*At the trial it appeared in evidence, that on the 17th of June, 1820, the plaintiff and defendant entered into a written contract, which was deposited in the hands of A. W. Walworth, of the state of Ohio, who was examined as a witness under a commission, and set out, in his answer, a copy of the contract, retaining the original. By this contract, Bailey (the plaintiff) agreed to deliver at Black Rock, in the month of August then next, 200 barrels of salt, for which Johnson (the defendant) agreed to deliver at Cleveland, in the state of Ohio, to the plaintiff, 33 barrels of pork, and pay 304 dollars; the pork to be delivered and money paid as fast as the plaintiff delivered the salt.

The defendant objected that the original contract should be produced; but the objection was overruled.

Amasa Bailey testified, that in September, 1820, he came to Black Rock, where the plaintiff lay sick, and took from his pocket book an order drawn by Nathaniel Woodward on Sill, Thompson & Co. in favor of the plaintiff, for 169 barrels of salt, to be delivered on the payment of \$300 by the plaintiff to them.

The declaration was, that the salt was to be delivered to the plaintiff or order.

The witness farther testified, that he took the order and went to the store of Sill, Thompson & Co. at Black Rock, and presented it to Nathaniel Sill, one of the firm, who answered, that they had the quantity of salt belonging to Woodward; that the order was good, and the salt would be delivered at any time on the payment of the 300 dollars. The plaintiff shortly afterwards returned to his residence at Cleveland in Ohio, and soon after his arrival there, the defendant called on him, and it was then agreed between them that the plaintiff should transfer the order to the defendant, and that the defendant should go to Black Rock,

charged by it, and he refuses to produce it, putting his antagonist to parol proof, the presumption shall be against him, that the order is in the terms insisted on by his antagonist.

A parol acceptance of an order from the owner of goods, by his depositary, is valid and binding on the depositary, according to the terms of the order.

An endorsement by a deliverer, and a delivery of an order for goods, with intent to assign it, operates as a valid assignment.

An endorsement and delivery, with intent to assign, by the deliverer, of an order for goods, drawn in his favor by the owner on his depositary, who accepts the order, is a sale of the goods, and such a sale is a good consideration for a promise.

and pay Sill, Thompson & Co. the 300 dollars, receive the salt, and pay the plaintiff in pork at Cleveland, according to the terms of the original agreement, with the exception that he was to pay towards the 162 barrels the \$300 expressed in the order, to Sill, Thompson & Co. The plaintiff then endorsed the order, and delivered it to the defendant, and stated to him that the \$300 "must be paid to Sill, Thompson & Co. soon, otherwise he could not let him have the order; whereupon the defendant agreed that he would go immediately to Black Rock, and pay the money, and, as soon as he could return to Cleveland he would deliver the pork. The salt was then considered by the parties as worth 4 dollars per barrel at Black Rock. This agreement was made between the 1st and 20th of October, 1820.

The defendant objected that proof of a parcel acceptance of the order was insufficient. The objection was overruled.

The defendant proved by N. Sill, one of the firm of Sill, Thompson & Co. that in July, 1820, Nathaniel Woodward, jun. delivered them in store 162 barrels of salt; that it remained there until the winter following, when a part of it was either sold or went in kind to pay transportation and storage to the company, and the rest was delivered to Nathaniel Woodward, jun. The witness stated that he knew no such person as Nathaniel Woodward, other than what he learned from entries on his books. He had no recollection that the defendant ever called for the salt, or that the order was presented by the witness, Bailey.

The defendant's counsel objected that the order had not been accepted so as to bind the drawees to deliver to the defendant, or protect them from a demand by Woodward;

That the order was not endorsed so as to give the defendant a right to enforce it;

That it did not appear to have been drawn in favor of the plaintiff for value received by Woodward; the plaintiff, therefore, had no interest in the salt, which remained to Woodward, who took it away;

That the defendant had never received any of the salt,

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nor did it appear but that the plaintiff was the mere agent of Woodward, having no interest.

The judge overruled these objections, and charged the jury that the order passed a subsisting interest in the salt to the plaintiff, subject to the charges of the forwarder ;

That, especially after presentment, the drawees declaring it good, it imported value in itself ;

[*118] *That the parol assignment and delivery passed the plaintiff's interest, and was a good consideration for the defendant's promise to pay ;

That Sill's acceptance bound him to hold the salt, subject to the order, at least, for a reasonable time ; and

That the defendant, by the assignment and delivery, acquired a right to the salt, which he might enforce against the drawees, either in his own name or the plaintiff's ;

That it was immaterial whether the order was drawn for value received or not ; but if that were important, the presumption was against the defendant, who held the order, and should produce it ;

That, though the salt went to Woodward, for aught that appeared, this was by consent of the defendant, who might have received from Woodward all his (the defendant's) interest was worth ;

That the order remained unaccounted for.

Verdict for the plaintiff of \$376.

J. L. Wendell, for the defendant now moved for a new trial, on the points insisted on at the circuit.

S. A. Foot, contra.

Curia, per *Woodworth*, J. As to the written contract made in June, 1820, it appears to me to have been substantially abandoned, and another substituted in October then following ; for it will be perceived that the last contract is variant from the first, and inconsistent with it. The first is, that the plaintiff should deliver 200 barrels of salt, and the defendant should pay 33 barrels of pork, and

304 dollars ; by the last, the plaintiff agrees to assign, and does assign, an order on Sill, Thompson & Co. for 169 barrels of salt, the defendant to pay them 300 dollars, and pay the plaintiff in pork at Cleveland, according to the terms of the original agreement. This was matter of reference merely, to specify the manner of payment for the salt.

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But, whether the written agreement was rescinded or not, it was competent for the parties to make another contract respecting a different quantity of salt to be transferred and *delivered in a manner variant from the first. The plaintiff rests his action on this last contract, and, as it appears to me is entitled to recover. He held an order from Nathaniel Woodward for 169 barrels of salt. Whether the words "value received" were contained in it, or the words "or order" inserted is immaterial. If they were material, the defendant, to whom the order was delivered, and who has given no evidence as to the disposition of it, ought to have produced the paper, in order to ascertain whether those words were inserted or not. But it is enough that the plaintiff held an order for the delivery of the salt. In the absence of all proof, the court are not authorized to presume the plaintiff was the agent of the drawer, but will intend that he was the person to be benefitted by the delivery ; and particularly after the order had been presented and verbally accepted. If the plaintiff was entitled to receive the salt to his own use, the authority to direct the delivery to another was incident and inseparable, and need not be expressed. What then, was the intention of the parties ? Undoubtedly this : the defendant was willing to take a transfer of the order, or, in other words, instead of the plaintiff actually going to Black Rock, and making a personal delivery, the defendant was satisfied that the same thing would be accomplished by the assignment of an order, the validity of which could not well be doubted, it having previously been presented to Sill, Thompson & Co. and declared by one of that firm to be good. The defendant was willing to take this, and, in consideration, bind himself to pay the plaintiff according to their contract.

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This was a good consideration, and legally binding. For aught that appears, the defendant might have received the salt, had he applied at any time within four months after the contract. All that he proves on this point is, that in the winter following, the salt was delivered or accounted for to Nathaniel Woodward. By what authority, or under what pretence he received the salt, we are left to conjecture. He may have obtained the possession rightfully in various ways. *Non constat*, but that he had acquired the defendant's interest by purchase. But admitting that he had not, the fact only proves that Sill, Thompson & Co. erred in considering him the owner, after the order had been presented to them by Bailey, and they had admitted its validity. By the assignment of the order for the salt, *prima facie* the defendant must be considered the owner; and, on the facts appearing in this case, I perceive no objection to the right of the defendant to call on Sill, Thompson & Co. by action, on their refusal to deliver the salt. If, indeed, the plaintiff was only the agent of Nathaniel Woodward, and not the rightful owner, the transfer of the order, which amounted to a sale of the property by him, was a fraud, and the consideration for which the defendant contracted failed; but as nothing of this kind appears, and the contrary is to be presumed, I think there is no sufficient ground to set aside the verdict, and consequently the motion for a new trial is denied.

New trial denied.

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JACKSON, ex dem. MERRICK, against Post.

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EJECTMENT, tried at the Madison circuit, March 28th, 1827, before WILLIAMS, C. Judge.

The case is stated in the opinion of the court.

S. L. Edwards, moved for a new trial.

J. A. Spencer, contra.

Curia, per SUTHERLAND, J. The lessor of the plaintiff claims title to the premises in question under a deed from Charles Merrick, dated April 25th, 1807, acknowledged the 8th of August, 1808, and recorded the 25th of April, 1812. It was a warranty deed for 20 acres of lot No. 53, in the township of Cazenovia, in Madison, a recording county, and the consideration expressed in it was \$300. The title of the grantor, Charles Merrick, is admitted. The 20 acres conveyed were a part of a farm of 89 acres, of which he was in possession at the date of the deed. The lessor of the plaintiff was his son, and lived on a part of the farm, in a separate house, not on the 20 acres, and worked the whole farm together with his father. The crops were not kept separate, and the 89 acres continued to be improved as one entire farm, after the deed to the lessor, as it had been before; the lessor remaining in possession ostensibly as before.

The defendant's title is derived from a sheriff's sale, under a judgment against Charles Merrick (the grantor) and others. The judgment was docketed the 9th of August,

subsequent grantees under the judgment, yet held that the judgment was no lien on the land, and that the conveyance by the judgment debtor was valid even as against a subsequent *bona fide* purchaser under the judgment. [1]

[1] All the rest of this note, commencing from the words "And therefore, where the debtor," &c., is inaccurately reported. For so far from the purchaser being a *bona fide* purchaser without notice, the fact affirmatively appears in the body of this report, that at the sheriff's sale, he had notice of the prior deed to the lessor of the plaintiff, and that such notice was communicated to each of the subsequent grantees down to the defendant. See Jackson v. Chamberlain, 8 Wen. 627. Jackson v. Post, 15 id. 583

As between the parties to a deed, though in a recording county, the recording of it is not necessary to give it force and effect. Title passes without registry.

But an unrecorded deed in a registering county, within the act, (1 R. L. 370, sess. 36 ch. 97, s. 4.) which declares it void as to subsequent *bona fide* purchasers or mortgagees, &c. is not void as against a judgment. And therefore, where the debtor in the judgment conveyed his land before judgment obtained, though the deed was not recorded for several years after a sale under the judgment, and no notice of the first deed was given to a

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fide purchasers or mortgagees, &c. is not void as against a judgment. And therefore, where the debtor in the judgment conveyed his land before judgment obtained, though the deed was not recorded for several years after a sale under the judgment, and no notice of the first deed was given to a

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1808. Execution (*a. fi. fa.*) was issued thereon, the 20th of February, 1809, under which all the right and title of Charles Merrick to lot No. 53 (which includes the premises) were sold to Jacob Ten Eyck for \$705 17. The sheriff's deed to Ten Eyck was dated the 1st of April, 1809, and was duly recorded on the 21st of the same month. Several mesne conveyances from Ten Eyck to the defendant were duly proved. Ten Eyck seems to have taken possession about two years after the sale, and on the 25th of September, 1813, sold and conveyed the premises to Daniel Elliott, who, on the 18th of April, 1816, conveyed them to Smith Elliott. He, on the 15th of March, 1817, conveyed to Asahel S. Postletow, and Postletow conveyed to the defendant on the 19th of April, 1817.

It was proved that Ten Eyck, the purchaser at the sheriff's sale, knew of the deed from Charles to Thomas Merrick, the lessor, before the sale.

A witness also testified that he heard Daniel Elliott, Ten Eyck's grantee, say, about three months after he went into possession of the lot, that he had heard of Thomas Merrick's deed, but Ten Eyck was able to save him harmless. At another time he said he had heard of the deed, but not that he knew of it when he purchased. Smith Elliott, the grantee of Daniel, was present at the first conversation; and he, Smith Elliott, told Postletow, his grantee, before he purchased, that Thomas Merrick had a deed of the 20 acres. The same witness also testified that Jacob Post, the defendant and the grantee of Postletow, after he went on to the lot, told him *that he knew of Thomas Merrick's deed, but that Ten Eyck told him that his deed was upon record first, and that Thomas Merrick's deed was not on record; that he had agreed to give it up.

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The plaintiff's counsel contended, and called upon the court to charge the jury, 1. That this was not a case within the registry acts; that Charles Merrick having conveyed the 20 acres to Thomas Merrick, the lessor of the plaintiff, before the judgment was obtained or docketed against him, he, Charles Merrick, had no title to or interest in the 20 acres at that time or the time of the sale, on which the

judgment was a lien; and of course no title passed to the purchaser at such sale. 2. That Ten Eyck had actual notice of the lessor's deed; and that deed having been recorded before Ten Eyck conveyed to Elliott, the registry became legal notice to him and all subsequent purchasers. 3. That the question of actual notice was a question of fact for the jury.

But the judge ruled. 1. That the registry acts are not confined in their operation to subsequent purchasers immediately from the same grantor; but that one purchasing under a judgment against such grantor, if his deed from the sheriff is first recorded, is protected; 2. That if Daniel Elliott and the purchasers subsequent to him had not actual notice of the deed to the lessor when they took their conveyances, they were not affected by the constructive notice resulting from the recording of Thomas Merrick's deed subsequent to the recording of Ten Eyck's, though prior to their respective purchases; 3. That whether they had actual notice was a question of fact for the jury; and 4. That although Post, the defendant, may have had actual notice of the lessor's deed when he purchased, yet if Daniel Elliott, or any purchaser between him and Post, was a *bona fide* purchaser without such notice, so that he would have been protected if he had not conveyed, then Post, the defendant, deriving title under such *bona fide* purchaser, is protected, although chargeable with notice.

The judge charged the jury accordingly, and the counsel for the plaintiff excepted to these several opinions; and the jury found a verdict for the defendant.

*No question of actual fraud is raised in the case. It is not denied that the purchase of Thomas Merrick was *bona fide*, and that the consideration money was paid.

1. Charles Merrick, on the 9th of August, 1808, when the judgment against him, which is the source of the defendant's title, was docketed, had no title to or interest in the premises in question, upon which that judgment became a lien. His title had passed to the lessor of the plaintiff, by the deed of April 25th, 1807. As between

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the parties to that conveyance, the recording of it was not necessary to give it legal force and efficacy. It divested the grantor of all his interest in the land, and transferred it to the grantee. It is true, that by force of the recording act, (1 R. L. 370, sect. 4,) the title of the grantee might still be defeated, if he delayed recording his deed until after the grantor had conveyed it to another *bona fide purchaser or mortgagee* for a valuable consideration, who had recorded his conveyance: The policy of the act was to compel the purchaser of land to put his conveyance upon record, so that the vendor would not have it in his power to perpetrate a fraud by selling it a second time. And the act makes the first purchaser a party to the fraud, and avoids his conveyance on that ground. But the act does not declare that an unrecorded deed shall be adjudged fraudulent and void against a subsequent judgment.

It has been adjudged, under the act requiring mortgages to be registered, (1 R. L. 373, sec. 2,) that a judgment creditor is not a *bona fide purchaser* within that act, and that a judgment docketed has not a preference over an unregistered mortgage. (Jackson v. Dubois, 4 John. 216.) Judge Spencer, in the case cited, says the judgment being by act of law, does not destroy the *lien* acquired by an unregistered mortgage, nor gain a preference over it. But he expresses the opinion, that if the mortgagee should permit a sale to take place prior to the registry, the vendee of the sheriff would be protected from the mortgage, and it would lose its priority.

In Jackson *ex dem.* Merritt v. Terry, (13 John. 471,) it was held, that a sheriff's deed for land must be recorded like any other deed; and that, if after land has been sold on execution, and a conveyance made by the sheriff, and before such conveyance is recorded, the former proprietor conveys it to a *bona fide purchaser* for a valuable consideration, who has his deed first recorded, such subsequent purchaser will secure a priority. In this latter case it will be observed, the judgment and sale under it were prior to the conveyance, which was first recorded, and which, on that ground, was held to be entitled to priority; so that the

question which arises in this case was not presented. In each of those cases there was an interest in the defendant in the execution, which was liable to be sold, and on which a judgment would be a *lien*. In the first case, the defendant in the execution was a mortgagor, and the interest of a mortgagor may be bound by a judgment; in the other case, the first conveyance was void, and left the interest of Archibald Turner in the same condition as though it had not been made; and of course liable to the lien of a judgment.

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But the case of Jackson v. Town, (4 Cowen, 606,) is decisive on this point. [1]

In that case, the lessor of a judgment claimed under a judgment against Eleanor Town, docketed in February, 1823, and a sale under it, at which he became the purchaser of the right and title of the defendant in the execution to the premises in question, which were conveyed to him by a sheriff's deed, recorded. The defendant, who was the daughter of Eleanor Town, showed a conveyance in fee from her mother to her, of the premises in question, dated March 30th 1821, for pecuniary consideration. This conveyance was not recorded; and after considering the case in its other aspects, the judge who delivered the opinion of the court proceeds, in page 604, to discuss the question, whether Eleanor Town after the conveyance to her daughter of the 30th of March, 1821, (admitting it to have been *bona fide* and uncontaminated with fraud,) although that conveyance was not recorded, had an interest in the premises which could be bound by a subsequent judgment, and sold under an execution. He remarked, that after the 30th of March, 1821, there was no interest remaining in Mrs. Town that was the subject of sale. She had no lands, tenements or real estate within the meaning of the statute; and consequently there was nothing to give life or effect to a sheriff's deed, which solely derives its efficacy from the fact, that the defendant in the execution had an inter-

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[1] This case is commented on and explained in Jackson v. Post, 15 Wen. 596.

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est liable to be sold. In considering the effect of the sheriff's deed having been first recorded, it is conceded that the statute, (1 R. L. 370,) is not confined to a purchaser immediately from the same grantor; but that it is applicable to cases where the second deed was obtained *mediately* or indirectly from the same grantor, in consequence of a sale under a judgment against him: as if the defendant in the execution had previously mortgaged the premises, which mortgage was not recorded, there the purchaser under the judgment at the sheriff's sale, would be protected against the mortgage. But a sheriff's deed is not within the recording act, where the defendant in the judgment and execution had no interest in the premises which could be bound by a judgment or sold under an execution. [1]

It is further remarked in that case, that a subsequent *bona fide* purchaser, within the meaning of the act, must be one to whom the grantor in the first deed actually conveyed, or that he did or suffered some act, which, by the operation of the law, authorised a sale and conveyance, and if the deed was in consequence of a sale under a judgment, then that the property sold was a legitimate subject of such sale.

These views and observations are directly applicable to this case, and are decisive of the plaintiff's right to recover.

A new trial must therefore be granted.

New trial granted.

[1] It has since been decided in the Court of Errors, that a purchaser at a sheriff's sale of real estate who procures his deed to be duly registered, cannot claim the benefit of the registry act, against a third person in the actual possession thereof, under an unregistered deed; as such possession was constructive notice to the purchaser, to impose on him the duty of inquiring as to the rights of the person in possession. *Tuttle v. Jackson*, 6 Wen. 313. See also *Jackson v. Post*, 15 Wen. 588. *Hooker v. Pierce*, 2 Hill, 650. *Schutt v. Large*, 6 Barb. 373.

But the provision of the act, that unrecorded deeds shall be void against *bona fide* purchasers, &c. has no application to a purchaser who derives his title from one claiming in hostility to all the parties of the unrecorded deed. *Embury v. Conner*, 2 Sand. S. C. Rep. 99.

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JACKSON, *ex dem.* COLLIER, *against* JACOBY.

EJECTMENT, tried at the *Yates* circuit, June 27th, 1826, before WALWORTH, C. Judge; when a verdict was found for the plaintiff.

*J. A. Spencer moved for a new trial.

E. Williams, *contra*.

Curia, per SAVAGE, Ch. J. This was an action of ejectment, to recover part of lot 66, in township 6, in the first range of Phelps & Gorham's purchase.

Both parties claim under John Livingston. The lessor of the plaintiff showed title to lot 66, and James Dean, under whom the defendant claims, to lot 72.

The question is, whether the premises lie in lot 66.

The conveyances describe the lots by their numbers. The field book has been burned; the location, therefore, must be made out by other testimony.

The first objection was to the lessor's deed, on the ground of an alleged alteration. The letter *S*. is interlined after the word *lot*, and before *sixty-six*, in describing the subject of conveyance. The interlineation was not noted on the deed, and appears to have been made with darker ink than the other writing in the deed; and this is all the evidence of an alteration. The judge, at the circuit, thought this insufficient to establish a forgery; but perhaps it is sufficient to call for explanation on the subject. From the view which I have taken of this question, I do not consider it very important whether the *S*. was interlined when the deed was executed, or afterwards. The effect of an alteration in a deed conveying real estate, was considered by this court in the case of *Lewis v. Payne*, (8 Cowen, 71.)

Admitting that the deed read *lot*, in the singular, when it was executed, it then conveyed an estate in certain premises. The estate not being one which lies entirely in

Though a deed conveying land or other real estate not lying in grant, be altered even felonious-

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ly, after its execution, this does not avoid the title to the subject conveyed.

The lessor of the plaintiff owned lot 66, and the defendant lot 72, and the field book of the original survey was burned. On a question of what was comprehended in lot 66, *held*, that evidence was derivable from gnaps copied from the original survey.

What evidence admissible in locating the subject of a deed of land.

(*See the case.*)

Seem, that an interlineation in a deed, not noted, and appearing to be of different ink from the rest of the deed, calls for explanation from the one wishing to support the interlineation as genuine.

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grant, was not divested by a subsequent fraudulent, or even felonious alteration. [1]

The estate then continues, and the question is, what premises were conveyed by the description "*lot 66.*"

It is not uncommon for one lot to consist of two parcels.

This appears in testimony; and instances of this kind are known to the court. If the field book were to be found, that would show the description of lot 66; but in the absence of that proof, the fact that lot 66 is laid down on maps copied *from the original survey of the town with the name of John Collier, the lessor of the plaintiff, upon it; that the lots contain 250 acres each; and that number 66, without the premises in question, contains but 125 acres; and lot 72, to which the defendant claims that the premises in question belong, contains, without these premises, very near its quantity; these are circumstances which warranted the jury in finding that both pieces belonged to lot 66.

The other question in the cause is one of location purely. Lots 72 and 66 lying adjacent to each other, do the premises in possession of the defendant lie in lot 66? On this point, the testimony leaves the question as to the line not so satisfactory as might be desired. The fact of a line having been run, leaving about 249 acres in 72, and about 220 in 66, is established: and that this line was run 35 or 36 years before the trial, and corresponding or nearly so, with the other interior lines of the town, is not to be questioned; but the line does not seem to correspond with any others; and is, in itself, not a straight line. The opinions of witnesses, some that it was a hunter's line, and others that it was the division between lots, were all fit subjects for the consideration of the jury.

I am of opinion, on the whole, that the motion for a new trial be denied.

New trial denied.

[1] Schutt v. Large, 6 Barb. S. C. Rep. 373. Jackson v. Gould, 7 Wen. 366. Morgan v. Elam, 4 Yerger, 375. Herriek v. Malin, 22 Wen. 388. but such an alteration will avoid covenants, *id.*

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*RANSOM, late sheriff of Niagara, against KEYES and
LONDON.

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DEBT on bond, given by the defendants to the plaintiff as sheriff of the county of Niagara, (now the county of Erie,) tried at the Erie circuit, before BIRDSALL, C. Judge, on the 7th day of September, 1826.

The declaration contained one count only, setting forth a bond, dated October, 23d, 1816, given by the defendants

The recital of a *ca. ss.* in a bond for the gaol liberties, is sufficient proof of it, in an action on the bond. [1]

Though the bond recite that the *ca. ss.*

issued on a judgment in debt, and the judgment in truth was in an action of *assumpsit*; *held*, that the variance was immaterial, the nature of the action being so, and its recital merely surplusage; and so it might be rejected.

A third person, liable to contribute to a defendant towards the amount of the plaintiff's recovery, is not a competent witness for the defendant; but the defendant may release him, and thus make him competent.

A release to one, liable to contribute to the recovery against a defendant must, in order to make him a competent witness for the defendant, be directly from the defendant himself to whom the witness is liable. It is not sufficient that it be from his co-defendant, who is surety for the defendant for the demand in question; for the witness is not liable to an action, at the suit of the surety. There is no privity between them.

Thus, where the action was on a limit bond, against one of two defendants, and the surety of the one, for his escape from the *ca. ss.* issued on a judgment against him and his partner, *held*, that his co-defendant, the partner, was not releasable by the surety in the bond from liability to contribute to the principal in the bond.

Where judgment is against two joint debtors, and the surety of one of them in a limit bond is compelled to pay the debt, on the ground of an escape of the one, this is equivalent to a direct payment by the principal: and the co-debtor is liable to contribute to him (the principal) immediately. At any rate, the principal, on refunding the money to his surety, will be entitled to contribution from his co-debtor.

Where one of two joint debtors causes the debt to be paid by a surety on a bond given by the surety, this is equivalent to direct payment by the debtor; and he may sue his co-debtor for money paid for him. At any rate, he may do this after he has refunded to his surety.

A discharge of one of two joint debtors under the insolvent act, before payment by his co-debtor, will not affect the claim of the co-debtor for contribution against the discharged debtor, towards the payment of the debt by the other, made subsequent to the insolvent assignment.

The arrest of a debtor on a *ca. ss.*, and subsequent discharge from the arrest by consent of the creditor, extinguishes the judgment.

So the arrest on a *ca. ss.*, and discharge of one of several joint debtors, by consent of the creditor, discharges and extinguishes the judgment as to all the debtors.

Thus, where one of two joint judgment debtors was arrested on a *ca. ss.*, and gave bond for the limits, and escaped, and the sheriff was sued for the escape, and then the other debtor was arrested on an *alias ca. ss.* and on paying part, was discharged by consent of one of the creditors, pending the escape suit; *held* that the whole judgment was extinguished; that this formed a valid defence to the action for the escape, which the sheriff should have pleaded, (the discharge being in season for his doing this;) and his neglect to defend on this ground was in his own wrong; and though he had suffered a recovery and paid the money in the action for the escape, he could not collect the amount paid by him upon the limit bond of the defendant who had escaped.

Where a sheriff, sued for an escape, waives a defence known to him, he acts at his peril; and, though the parties to the limit bond have notice of the suit, they are not liable.

[1] See Cowen & Hill's notes to Phil. Ev. 381; 2 id 455

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to *the plaintiff, in the penalty of \$824, with a condition that Chancey Keyes, (one of the defendants) who was in custody of the plaintiff as sheriff, by virtue of a *ca. sa.* issued out of the supreme court, at the suit of Eli Hart and John Lay, junior, should remain a true and faithful prisoner, and should not at any time or in any wise escape, or go without the limits of the liberties of the gaol of the county as then established, or at any time afterwards be established, until discharged by due course of law. The declaration then averred, that the bond and condition were taken pursuant to the statute in such case made and provided, and set forth a breach of the condition by the escape of Keyes on the same day in which the bond was given.

The defendants separately put in the plea of *nil debet*, and the defendant Keyes, under his plea, gave notice, that after he was arrested, Henry C. Bronson, (who was a co-defendant in the original judgment with Keyes,) was arrested on a *ca. sa.* on the same judgment by the plaintiff in this suit as sheriff; and that John Lay, junior, one of the plaintiffs in the original action, with the knowledge of the plaintiff, agreed that if Bronson would pay to him (Lay) \$122, he, Bronson, should be discharged, and that Bronson did pay the \$122, and that Lay did then discharge Bronson from the *ca. sa.*; and that Bronson, with the assent of Lay and Ransom, did go at large.

The defendant, Landon, gave notice under his plea, that after the arrest of Keyes, and after giving the bond, Bronson was arrested by the plaintiff, as sheriff, by a *ca. sa.* issued on the judgment; and while Bronson was in custody, he arranged and satisfied the judgment with the plaintiff, who voluntarily permitted him to escape and go at large. The notice further set forth, that after the giving of the bond, and after Keyes escaped, a *ca. sa.* was issued at Landon's instance and request, and for his indemnity, directed and delivered to the plaintiff, as sheriff, upon which Bronson was arrested by the plaintiff, who afterwards voluntarily suffered and permitted him to escape. The notice then set forth, that after the arrest of Keyes, and after the giving of the bond, after the escape of Keyes, the plaintiff paid

Hart and Lay the amount of the judgment which was transferred to the plaintiff, and afterwards a *ca. sa.* was issued to the plaintiff, on which he arrested Bronson, and that then Bronson paid and satisfied the plaintiff the amount of the judgment, whereupon, the plaintiff suffered Bronson to go at large.

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Landon then pleaded, that after the giving of the bond, and after Keyes escaped, viz. on the 26th of January, 1821, he was discharged under the act to abolish imprisonment for debt in certain cases. The memorandum in the *nisi prius* record was of August term, 1825.

On the trial, the plaintiff called on Moses Baker as a witness, who proved the execution of the bond by the defendants, and the arrest of Keyes; and that he frequently saw Keyes at Batavia, in Genesee county, since the arrest, and before the year 1825.

The defendant's counsel objected to the reading of the bond in evidence, until the execution on which the arrest was made should be produced. The court overruled the objection, and the bond was read in evidence, by which it appeared that the *ca. sa.* on which Keyes was arrested, as recited therein, was issued on a judgment in an action of debt.

John Root, Esq. was then sworn for the plaintiff, and testified that this suit was brought in March, 1825, and that it was the understanding between Keyes and Landon, the defendants, when Keyes gave bail for the limits, that Keyes was to go immediately home to Batavia, where he then resided; that the suit against Ransom for the escape was brought shortly after, and he presumed, and had no doubt, that Landon knew the fact; for he had frequent conversations with Landon in relation to it, about that time; and that he knew of the escape of Keyes.

Albert H. Tracy, Esq. was then sworn on the part of the plaintiff, and testified that he recovered a judgment as attorney for Hart and Lay against Keyes and Bronson, in August term, 1816, of this court, for \$412 $\frac{1}{4}$, and on the 20th of October, 1816, issued a *ca. sa.* thereon to Baker, a deputy sheriff under Ransom, the same on which Keyes was taken and upon which taking the escape complained

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of was made. On the 26th of October, 1816, he entered in his register a "suit against Ransom for the escape of Keyes, and on the 4th of November following issued a *capias*, and on the 18th handed the same to Fillmore, a coroner of the county, returnable at the January term following, and in May term, 1817, judgment was obtained by default against Ransom for the escape of Keyes, for \$466 36 debt, damages and costs. The witness paid the amount to Hart and Lay in March, 1818. In November, 1819 Ransom paid the amount to the witness, though it was understood between them before. That on the 14th of January, 1817, an *alias ca. sa.* was issued against Bronson, on which he was taken: Bronson then paid \$132 on the judgment. Bronson and the sheriff then left the witness office. The witness also stated that a *ca. sa.* against Bronson was not issued at the instance of Hart and Lay; but whether at the instance of Landon or Ransom, the witness did not recollect. That he knew nothing of any arrangement, and would take no responsibility upon himself by giving any directions about it, because he considered Ransom holden for the judgment by means of Keyes' escape, and intended to hold him liable; and that the reason why the amount was not paid sooner by Ransom was, that Ransom had a large account against the witness for sheriff's fees, and that shortly after Ransom became fixed, it was agreed that the amount of the judgment should be applied on the sheriff's bill; but an actual settlement did not take place till November, 1819. That the action against Keyes and Bronson was *assumpsit* on a promissory note, and he had no doubt the *ca. sa.* was issued as in *assumpsit*. The plaintiff here rested.

The defendant's counsel then moved for a nonsuit, on the following grounds: 1. That the *ca. sa.* on which Keyes was arrested ought to be produced. 2. That the testimony of Mr. Tracy showed that the *ca. sa.* was in *assumpsit*, and the bond recited a *ca. sa.* in a plea of debt. 3. That the testimony showed that Bronson had been discharged from the *ca. sa.* by the consent of Lay, which enured to the benefit of Keyes and his bail.

The court overruled the motion, and reserved the points.

The defendants then called Bronson, who was sworn, and *was about to testify, when the plaintiff objected to his testifying, on the ground of interest ; that the testimony he was called to give, would go to defeat the plaintiff's recovery, if he testified to any thing ; that if the plaintiff recovered any thing against Keyes and Landon, Bronson would be responsible to Keyes for one half the recovery, as it was proved the judgment against Keyes and Bronson was obtained on a note given by them as joint partners in trade.

The defendant's counsel then, to avoid his interest, offered to show that Bronson had been discharged under the act for giving relief in cases of insolvency, passed April 12th, 1813, commonly called " the two third act ;" but the court rejected the witness as interested.

The counsel for the defendants also offered a release from Landon to the witness, contending that as the parties had pleaded separately, a release from Landon would render the witness competent to testify in his defence. The defendant's counsel likewise offered to prove by Bronson, that after he was arrested as above testified, he paid \$122 upon the *sa. ca.* and arranged the balance with Ransom, by promising to pay Ransom the balance ; and that upon this arrangement, he was discharged from the arrest by Ransom and Lay. The court still refused the witness as interested.

John Lay, junior, was then sworn as a witness on the part of the defendants, and testified that Bronson was arrested, as he understood ; thinks that Bronson and Ransom called on him at Tracy's office, or at his store, and he also understood that Bronson paid \$122 and was discharged ; but he left the business with Mr. Tracy as his attorney, to manage as he thought best : that he, the witness, made no specific arrangement with Ransom for the discharge of Bronson, though it was understood between the witness, Ransom and Bronson, that upon Bronson's paying \$122, Ransom might discharge him ; but it was not to affect Ransom's liability to Hart and Lay, for the escape of Keyes. Bronson accordingly paid to Mr. Tracy \$122,

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and was then discharged from the arrest as the witness understood.

The evidence here closed, and a verdict was taken, by consent for the plaintiff, for \$824 debt, and damages assessed* on the breaches to \$572 $\frac{1}{4}$, subject to the opinion of the supreme court on a case. If the court should be of opinion that there was sufficient evidence of a variance between the *ca. sa.* and bond, and if such variance did exist, that it was material, then a nonsuit should be entered; but if, on the other grounds, they were against the plaintiff, then a judgment should be entered for the defendants, or a new trial should be granted; and that either party, on the argument, should be at liberty to refer to and produce the pleadings in the cause.

S. Sherwood, for the plaintiff, insisted on the following points:

1. There was no necessity of producing the *ca. sa.* on which Keyes was arrested. The recital in the bond was conclusive.

2. Landon having notice of the pendency of the suit against the plaintiff, for the escape of Keyes, is chargeable with all the consequences of that suit.

3. The arrest and discharge of Bronson, after the escape of Keyes, and a suit brought for that escape, did not discharge that action. (*Powers v. Wilson*, 7 Cowen, 276.) This did not discharge the bond. It was not an arrangement to discharge a joint obligor. A technical release to such an one would discharge a bond; and this is the farthest that courts have gone. (*McLean v. Whiting*, 8 John. 339. *Dewy v. Derby*, 20 John. 462.)

4. There is no evidence that the plaintiff assented to the discharge of Bronson; nor is there sufficient evidence that Bronson was discharged at all.

5. Bronson was properly rejected as a witness. By swearing down the plaintiff, he could relieve himself from contribution to Keyes, as a co-debtor, to whom he would be liable, notwithstanding his insolvent discharge. (*Andrus v. Waring*, 20 John. 161. *Buel v. Gordon*, 6 id. 126. *Frost*

v. Carter, 1 John. Cas. 73.) Landon could not release so as to make Bronson competent. Landon had nothing to release. The liability was to Keyes, who did not offer to release.

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6. It is not competent for the bail to object that there was a variance between the recital of the bond and *ca. sa.* if any *existed. (Jones v. Cook, 1 Cowen, 309.) Besides, the recital was no necessary part of the deed. You may strike it out and yet the bond stands good. (Jackson v. Streeter, 5 Cowen, 530, and the cases there cited by Sutherland, J. Tallmadge v. Richmond, 9 John. 90.)

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J. Mc Kown, contra, insisted on the following points :

1. The plaintiff should have produced the *ca. sa.* on which the limit bond was taken. The bond depends on the statute ; and the sheriff must show his authority to take it, which are the judgment and execution.

2. The variance between the *ca. sa.* proved and the *ca. sa.* stated in the bond, is fatal.

3. Bronson should have been admitted as a witness. Keyes left the limits by Landon's consent. The act of Keyes could not at all affect his co-defendant ; and a release from him (K.) was unnecessary. His escape was a tort, for which Bronson was not bound to contribute. Beside, Bronson had long since been discharged under the insolvent act. Again, Landon offered to release the witness. He had pleaded separately ; and a release would make the witness competent as to Landon.

4. The discharge of Bronson from custody by Ransom, with the consent of the plaintiff in the original suit, released the other defendants, and their bail to the sheriff. It was a material alteration of the security (Rathbone v. Warren, 10 John. 587.)

Sherwood, in reply, said the discharge of Bronson from custody made no change in the rights of the sheriff. They were perfect on Keyes' escape before the discharge of Bronson, and continued the same afterwards. The arrest and discharge of Bronson was beneficial to Keyes and Lan-

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don; for the payment by the former diminished the amount due from the latter.

Curia, per WOODWORTH, J. This was an action of debt on a bond, conditioned that Keyes, who had been arrested on a *ca. sa.* should remain a faithful prisoner.

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*It appeared that a judgment was obtained in August term, 1816, in favor of Hart & Lay, against Keyes & Bronson, for \$412. The judgment was in *assumpsit*. In the vacation following, a *ca. sa.* issued, on which Keyes was arrested, and shortly after escaped. In November, 1816, a suit was commenced against the plaintiff (the sheriff) for the escape; and judgment recovered in May term, 1817. The amount of this recovery, Albert H. Tracy, attorney for Hart & Lay, paid to them in March, 1818; and in November, 1819, the plaintiff paid the amount to Tracy.

On the 14th of January, 1817, an *alias ca. sa.* issued against Bronson, on which he was arrested, and paid \$122. Bronson and the sheriff then left Tracy's office.

The bond executed by the defendants recited that the *ca. sa.* issued in an action of debt.

It also appeared in evidence, that when the defendants executed the bond, it was the understanding between them that Keyes was to go home immediately.

The defendant moved for a nonsuit.

1. Because the *ca. sa.* on which Keyes was arrested, was not produced.

2. Because Tracy testified that the *ca. sa.* was in *assumpsit*, and the bond recited a *ca. sa.* in debt.

3. Because Bronson had been discharged from the *alias ca. sa.* by the consent of Lay.

As to the first objection; the bond admitted the *ca. sa.* and the plaintiff was not obliged to produce it.

As to the second; the bond is not fully set out in the case. The recital is, that the *ca. sa.* issued on a judgment in an action of debt. The *ca. sa.* was correct; the defendant was arrested on it. The mistake is merely in this: that the sheriff inserted *debt* in the place of *assumpsit*. The variance is not material, because the bond would have

been valid, had the description of the action been entirely omitted. It would have been sufficient to say that the defendant has been arrested by virtue of a *ca. sa.* issued on a judgment, stating the amount of that judgment. It is not even suggested that the amount of the judgment was not truly inserted in the *ca. sa.* *It follows, therefore, that the description of the action was surplusage; and according to the established rule, surplusage consisting of immaterial matter, never vitiates.

As to the *third* objection, there had no evidence been given, in that stage of the cause, that Bronson had been discharged.

The court properly overruled the motion for a nonsuit.

The defendant then called Bronson, the co-defendant with Keyes. He was sworn, and about to testify, when the plaintiff objected, on the ground of interest, urging, that if he testified to any thing, it would go to defeat the plaintiff's recovery; and that if the plaintiff recovered against Keyes and Landon, Bronson would be answerable to Keyes for one half of the recovery, it appearing that the judgment against Keyes and Bronson was obtained on a note given by them as joint partners. The defendants to avoid this objection, offered to show that Bronson had been discharged under the insolvent act of 1813; and also offered a release from Landon to the witness, contending that, as the defendants had pleaded separately, such a release would render the witness competent to testify in his (L.'s) defence. The evidence proposed to be given by Bronson was, that after he was arrested, he paid \$122 on the *ca. sa.* and arranged the balance with the now plaintiff, and was, therefore, discharged from the arrest by the plaintiff and Lay.

It seems to me, the witness had a direct interest to defeat the recovery. He was equally liable for the debt. If the plaintiff recovered in this cause, such recovery, with a consequent payment, would extinguish all further claim arising in consequence of the judgment of Hart and Lay against Keyes and Bronson. Admitting that, after this recovery, Landon should pay the whole to the plaintiff, Keyes would be liable to Landon for the money paid. On his payment,

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a right of action would accrue against Bronson for one half But without this, a payment by Landon must be considered as a payment made by Keyes' procurement; for it would be made on a bond which Keyes had prevailed on Landon to execute for his benefit and enlargement. I do not perceive any material difference, therefore, whether Landon had advanced the money for Keyes when he was arrested, or subsequently paid it, in consequence of a recovery on the bond he had given. As between him and Keyes and Bronson, it was enough that the former had paid, or caused to be paid; nor could Bronson defeat a recovery against himself, because satisfaction was made in the latter way.

The claim of Bronson would arise, if at all, subsequent to the discharge under the insolvent act, and, therefore, cannot be affected by it.

As to the release of Landon; this does not remove the objection. There is no privity between Landon and Bronson. That is between the former and Keyes; nor do I know on what ground Landon could maintain an action for money paid, against Bronson, to him (Landon) a stranger. Keyes might have his remedy over against Bronson, which Landon could not control. I think the judge correctly excluded the witness. [1]

The defendant then called Lay as a witness. He testified, that he understood that Bronson was discharged on the *alias ca. sa.*; that he left the business with Tracy, his attorney, to manage as he thought best; that the witness (Lay) made no specific arrangement with Ransom, the sheriff, for the discharge of Bronson. He thought it was understood between him and the sheriff, that upon Bronson's paying 122 dollars, the sheriff might discharge him; but it was not to affect the sheriff's liability to Hart and Lay, for the escape of Keyes.

From this evidence, I think it is to be inferred that the sheriff did discharge Bronson with the consent of Lay; and

[.] The old rules relative to the exclusion of witnesses, on the ground of interest, are abolished by § 398, 399, N. Y. Code. See also *Washington Bank v. Palmer*, 2 Sanf. S. C. R. 686. *Mesick v. Mesick*, 7 Barb. 120.

it presents an important question upon the legal effect of the discharge.

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It appears that the escape of Keyes was in the August vacation of this court, 1816, and on the 18th day of November, of the same year, Hart and Lay commenced an action for the escape against the sheriff. While that suit was pending, (January 14th, 1817,) the *alias ca. sa.* was issued against Bronson, on which he was taken, and then paid the 122 dollars, and was discharged. The case does not state the day on which this arrangement took place but it was evidently *shortly after the *ca. sa.* issued and previous to May term, 1817, when the judgment was obtained against the now plaintiff. The probability is, it was shortly after January 14th, 1817, and undoubtedly in sufficient season to have enabled the sheriff to avail himself of the legal effect of the discharge as a defence to the action commenced against him for the escape. He did not interpose any defence, but voluntarily paid the recovery against him, in 1819, in pursuance of an arrangement so to do long previous. Tracy paid Hart and Lay their judgment in March, 1818. This he undoubtedly did in consequence of the sheriff having, shortly after the escape of Keyes, agreed that the judgment should be applied on the sheriff's bill against Tracy, for fees, which was afterwards done.

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There can be no difference of opinion as to the justice of this case. Keyes and Bronson have never paid any thing beyond the 122 dollars ; and the sheriff has satisfied the judgment against them. The rules of law, however, are inflexible, and cannot bend to the hardship of a particular case. If, in judgment of law, the discharge of Bronson by the consent of Lay, satisfied and extinguished the judgment, then the now plaintiff acted at his peril, in waiving the defence which it was competent for him to make ; and subsequently, in his own wrong, making payment.

The law applicable to this point was considered in *Lathrop v. Briggs*, (8 Cowen, 171,) where the cases are collected. A discharge of the debtor from arrest on execution, by the creditor's consent, extinguishes the judgment. (2 Mod. 136. 1 T. R. 557. 4 Burr. 2482. 7 T. R. 420.

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5 John. 364. 16 id. 181. 2 East, 243.) These authorities proceeded on the ground that the plaintiff received a satisfaction in law, by having his debtor in execution. That this principle is applicable to a case where there are several defendants, and one is taken and discharged, was decided in *Clark v. Clement & English*, (6 T. R. 525,) where it was held, that if a plaintiff consents to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him, or any of the others. In that case, after one of the defendants had been taken and discharged on certain terms, a second *ca. sa.* was issued, on which he was again arrested. The motion was to show cause why he should not be discharged, and satisfaction entered on the roll. After argument, the rule was made absolute.

If the doctrine, then, is well settled, that where there is but one defendant, his discharge after arrest on a *ca. sa.* by the plaintiff, operates as a satisfaction of the judgment, it seems to follow, that where there are several defendants, all are discharged. [1] Upon what principle is it, that after the discharge of one, you can not arrest the other? It must be, that the judgment was no longer in force; for if it is, execution follows of course. If, then, Keyes had not been arrested when Bronson was discharged, on the authority of the case cited, to which I subscribe, Keyes could not have been legally arrested. But he had been previously arrested, and escaped. Will this produce a different result? I do not perceive any well founded distinction; for if the judgment is to be considered as legally satisfied, Hart and Lay have no cause of action against the sheriff for an escape; and consequently, the sheriff could not have recovered the amount of the judgment on the bond. The defendants would have been protected against a recovery, unless, perhaps, for nominal damages.

This case does not depend on the doctrine that the principal shall do no act to injure the surety; but on the ground

[1] *Quere*, the effect of article second, § 25 to 29, of Revised Statutes, 4th ed. 167, 8, as to the above doctrine? See also *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461. *Hoffman v. Dunlop*, 1 Barb. S. C. Rep. 185.

that lay, by his act, discharged the judgment; and if so, the foundation upon which damages are claimed falls to the ground. While I have no hesitation in saying the defence is unjust, inasmuch as if the preceding view be correct, the defendants, in a court of law, get rid of a large judgment without the actual payment of more than a small portion, I have not been able to arrive at a conclusion in favor of their liability. Judgment must be entered for the defendant.

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Judgment for the defendant.

*JACKSON, *ex dem.* WOODRUFF and others against CODY.

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EJECTMENT, tried before THROOP, circuit judge, at the Onondaga circuit, on the 8th day of February, 1827.

A patent was to Patterson, who was described in the balloting book

by that name, and as a revolutionary soldier. The plaintiff proved and relied on a deed from Patterson, described as such soldier in the body, but signed Petterson; *held*, no material variance, and that, at any rate, it was such an ambiguity as might be explained; and that, if the soldier intended by the deed was Petterson, and a man different from Patterson, it lay with the defendant to show this. He had a right to show it.

To warrant proof of the hand writing of subscribing witnesses, or either of them, as a substitute for their production, it must be proved that they are all either dead or beyond the jurisdiction of the court. This must be shown with reasonable certainty.

Proof that a witness cannot be found, on diligent inquiry, is evidence of his death or absence. (Inquiry in this case was made mainly at the place where the deed described the grantor as residing.)

Where there was a dispute as to the identity of a witness to a deed, there being several persons of the same name, a witness, in order to identify him, was allowed to compare the hand writing subscribed as an attestation to the deed, with another writing long in his possession, and reputed to be the hand writing of a man of the name subscribed, though he had never seen that man write. This evidence was received without objection; and the court inclined to think the evidence would have been admissible for the purpose of identity, even if it had been objected to.

Where all the subscribing witnesses to a deed are dead, proof of the hand writing of one of them proves the deed.

Testimony not objected to, must be considered as received by consent.

Where the lessor of the plaintiff shows a deed of land under which he claims from A., and the defendant shows a subsequent deed of the same land, under which he claims, from a person of the same name with A., it lies with him (the defendant) to show that the grantor in the first deed was not the owner of the subject granted.

If there be a defect of proof on one side at the trial, which may be supplied, the opposite party must object such defect. If he omit to do so, he cannot avail himself of the defect on a motion for a new trial.

Thus, where the defendant claimed land in the military tract as a subsequent purchaser, the plaintiff's previous deed having been duly deposited as required by law, on a motion for a new trial, the defendant would have objected that the mere deposit of the deed was not

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*The action was brought to recover a part of lot number 43, in the town of Cicero.

The plaintiff called as a witness Abraham Gridley, clerk of the county of Cayuga, who produced the exemplified copy of the balloting book belonging to the office of the clerk of Cayuga county, and filed in that office pursuant to statute. The original was filed in the office of the secretary of state. From this it appeared that William Patterson drew lot number 43, in the 6th township, (Cicero,) for his services as a soldier in the revolutionary war with Great Britain; and that the lot was patented to him on the 13th of September, 1790. The entry in the balloting book was in the words and figures following:

William Patterson,	Regiment.	Township.	Lot.	Acres.	When patented.
Private.	Hazen's.	No. 6.	43.	500.	Sept. 13, 1790.

Gridley testified that the exemplification was the copy of the balloting book filed in his office as clerk of the county of Cayuga, in pursuance of the statute for that purpose.

The plaintiff next produced and read in evidence an exemplification of a patent for the lot to William Patterson, dated September 13th, 1790, and which was approved by

notice to him; *sed non allocatur*, for this was not objected at the trial; and *non constat*, that if it had been actual notice might not have then been proved.

And so, *semble*, actual notice of a deed of military land makes it available against a subsequent purchaser, though the first deed was not registered.

Where counsel rose to address the jury, and the judge told him he should charge against him, and he did not, therefore, address the jury; *held*, that this was a voluntary relinquishment of the right to address them, not compulsory by the decision of the judge.

Specimen of an entry in the balloting book, of land drawn to a revolutionary soldier.

This is the authority for a patent. Per SUTHERLAND, J., delivering the opinion of the court.

What is sufficient to prove the death or absence of a witness beyond the jurisdiction of the court viz. that he went from his residence more than 20 years ago, (as the witness testifying understood,) to New Orleans, or somewhere to the southward, and the witness testifying had since heard he was dead: received without objection.

The directory of the city of New York for the year 1792, searched, proved and produced in evidence without objection, to identify a grantor in a deed.

Endorsement of registry of a deed of military bounty land by the clerk of Albany, proved in a book kept in pursuance of the act of January, 1794.

A registry of deeds of military bounty lands by the clerk of Albany, appears, by the case, to be merely setting down the names of the grantors in a book, in order, as directed by the act of January, 1794, not copying or recording the whole deed, as under the general registry acts.

Claim of title and descent proved, showing a claim of five ninths of the prerogative question.

the commissioners of the land office, and passed the secretary's office on the 21st day of March, 1792.

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The plaintiff next produced a deed covering the lot, purporting to have been executed by William Petterson, describing him, however, in the fore part of the deed, as William Patterson, late a soldier in the revolutionary war, in Hazen's regiment, to John Blanchard, of the city of New York, gentleman, bearing date the 6th day of December, 1790; on the back of which was endorsed, "Registered 30th April, 1795," and an entry of the registry was read in evidence from the book of registry of filed deeds, kept in the office of the clerk of Cayuga; which book was produced by the witness Gridley, who testified that it was the book remaining in his office of such entries. This deed appeared to have been duly acknowledged on the 16th of March, 1808, and recorded in the office of the county of Onondaga on the 8th day of June, 1808.

*The deed was objected to as not being from William Patterson, but William Petterson, and the objection overruled.

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The plaintiff next produced a deed, purporting to have been executed by John Blanchard and Mary his wife, of New York, to Asa Danforth, bearing date March 27th, 1792, covering the lot in question, and another lot. This deed was witnessed by John Durham and Phineas Pierce, and was produced by the witness Gridley, who testified that it was one of the filed deeds in the office of the clerk of Cayuga county, and for the purpose of entitling it to be read in evidence, the plaintiff produced David Cook as a witness, who testified that he resided at Geneva 32 years; that he knew Phineas Pierce, and had frequently seen him write; that Pierce went away from Geneva 25 or 26 years since; and, as he understood, went to New Orleans, or somewhere to the southward; he had heard he was dead; that the name Phineas Pierce subscribed to the deed looks like his hand writing, and he believed it was. Daniel W. Farman, on the part of the plaintiff, testified that he went to New York in the fall of 1825, and made inquiry for John Blanchard. He was informed that a John Blanchard had

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lived in Water-street, in the city of New York, in the year 1792, and had moved somewhere up the North River, it was believed to Catskill; he found three or four persons who knew Blanchard at the time he resided in New York: two of them informed him when Blanchard went. The witness found, by the directory of the city of New York for the year 1792, that there were at that time living in the city two John Blanchards. The witness also made inquiry for John Durham and Phineas Pierce the witnesses to the deed, and upon a thorough examination, and after advertising for them, he could not find that any such men ever lived in the city. He only inquired in the city of New York. That he has since inquired, and found that a man by the name of John Durham once lived in the city of New York, that he afterwards lived in Newton, Tioga county, and is now dead. He was not informed when he died. He also ascertained that there was another John Durham, son of the one last above mentioned, who also lived in Newton, and died there about a year ago.

*Witness also found that there were two Phineas Pierces; and he had before, under a commission, proved that the Phineas Pierce who witnessed the deed, died at Plainfield, in the state of Connecticut. On the back of the deed was endorsed these words and figures: "Registered 30th April, 1795;" and the witness Gridley testified that the hand writing of that endorsement was the same in which the greater part of the filed deeds in his office were endorsed. The plaintiff then produced the book in which the clerk of the city and county of Albany was directed, by the act of the 8th of January, 1794, to register the name of every person whose name should be to any deed, as having executed the same, referring to deeds deposited under the act. The book belonged to the clerk's office of Cayuga county, and was produced by the clerk of that county, wherein appeared the registry of a deed from John Blanchard, dated March 27th, 1792, to Asa Danforth, registered 30th April, 1795, which was all the deed registered in that book in which John Blanchard was a grantor.

The reading of said deed in evidence was objected

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to, because the execution of it had not been sufficiently proved, and the objection overruled by the court; and the deed was then read in evidence.

The plaintiff then produced in evidence the exemplification of the record of a deed from Asa Danforth to John Carpenter, covering the lot in question, and also another lot in Aurelius, in the county of Cayuga, dated March 19th, 1798, acknowledged May 9th, 1798, and recorded in the Cayuga clerk's office, May 12th, 1798.

George Hall, a witness for the plaintiff, testified that he knew John Carpenter, that he died in 1801, that five of the lessors of the plaintiff were his children and heirs at law; and the plaintiff claimed to recover $\frac{1}{4}$ of the premises in question, Carpenter leaving nine heirs. D. W. Farman, for the plaintiff, proved the defendant, at the time the suit was brought, in possession of 240 acres on the west side of said lot.

Here the plaintiff rested, and the defendant moved to nonsuit the plaintiff, because he had not identified which of the John Blanchards was the grantee in the aforesaid deed from *William Petterson, nor under which John Blanchard they claimed. The court denied the motion.

The defendant, in his defence, introduced as evidence the directory of the city of New York for the year 1792, from which it appeared that there were two John Blanchards then residing in that city, one in Water-street, a tavern-keeper, and the other in Partition-street, a brass founder.

The defendant next produced in evidence the record of a deed covering the lot in question, from John Blanchard, described as being late of the city of New York, to Justus McKinstry, of the city of Hudson. It was a quit-claim deed for the consideration of \$300, bearing date the 7th day of November, 1817, duly proved on the 8th day of November, 1817, and recorded in the office of the clerk of Onondaga county, on the 8th of December, 1817.

The defendant next produced a quit-claim deed of the lot in question, from Justus McKinstry to Alexander Neeley, dated January 28th, 1824, for the consideration of 1000 dollars, duly acknowledged and recorded in the office of

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the clerk of the county of Onondaga, on the 8th day of December, 1824.

The defendant then produced in evidence a warranty deed for the premises in question, from Alexander Neeley and wife to Isaac Cody, the defendant, bearing date July 25th, 1822, duly acknowledged and recorded in the office of the clerk of Onondaga county, on the 3d day of April, 1824, for the consideration of 1600 dollars.

George W. Tanner, a witness for the defendant, testified that he knew a John Durham in Claverack, about six years ago; that he appeared to be a man rising 60 years of age at that time; that he never saw him write. He was a respectable man, and owned a small farm. The witness understood Durham had moved from Claverack about four years ago, to Windham, since which he had not heard from him. He had seen him very often.

Lathrop Main, a witness for the defendant, testified that he knew a John Durham and saw him last fall 10 or 12 miles east of Genesee river, and 4 miles from Livonia. He supposed him to be between 50 and 60 years of age, understood he lived at the place where he saw him, and that he was a farmer.

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*Benjamin Durham, for the plaintiff, testified that his grandfather's name was John Durham; that he had lived in New York, as the witness understood, and died previous to 1804; that the witness' father's name was also John Durham, and that he was also dead. The witness produced an instrument purporting to be executed by John Durham, which the witness understood to be his grandfather's hand writing, and the witness had no other knowledge of his grandfather's hand writing than from this instrument, which had been long in his possession. From such knowledge, the witness believes the hand writing subscribed to the deed from Blanchard and wife to Danforth, was the hand writing of John Durham, his grandfather.

Here the testimony on both sides closed, when the counsel for the defendant rose to address the jury. But his honor, the judge, remarked that he considered the case as

depending on questions of law, and not of fact; and that he should so charge the jury; and that he should also charge them that, upon the whole matter, the plaintiff was entitled to recover $\frac{1}{4}$ of the premises in question, upon which the defendant's counsel omitted to sum up the cause, and his honor (as above) directed the jury to find a verdict for the plaintiff, which they accordingly did.

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B. D. Noxon, for the defendant, now moved for a new trial on the following grounds:

1. No deed was shown by the plaintiff from the patentee. The names of Patterson and Petterson are entirely distinct. (15 John. 226. 10 John. 133. 12 John. 77. 5 John. 84.)

2. The deed from Petterson to Blanchard was not proved, so as to entitle it to be read; as there were two John Durhams, if not three, either of whom might be the witness. (2 John. Cas. 211. 1 Phil. Ev. 169, 364. 7 T. R. 266. 1 B. & P. 360. 5 Cowen, 383.)

3. There being two John Blanchards, either of whom might have been the grantee, the plaintiff was bound to identify. (13 John. 518.* 5 Cowen, 237. 4 Campb. 34. 1 B. & A. 19.)

4. The defendant was a *bona fide* purchaser; and therefore, as to him, the deed from Blanchard and wife to Danforth, *(being only a deposited deed,) was void. Such deeds, though deposited, are not notice to subsequent *bona fide* purchasers. (20 John. 659.)

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5. The defendant was precluded by the judge from going to the jury.

N. P. Randall, contra relied on the following points:

1. It was the province of the court, not the jury, to decide whether the deed offered in evidence as that of William Patterson, was competent to prove a conveyance from the patentee. (13 John. 518.)

2. The deed from Blanchard and wife to Danforth, was sufficiently proved to authorize its being read in evidence. The hand writing of one of the subscribing witnesses was proved, that he was out of the jurisdiction of the court;

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and that the other was either dead or could not be found, on diligent inquiry, where the deed purported to have been executed. In the case of so old a deed, proof of the hand writing of one witness, without accounting for the other, is sufficient. (1 Phil. Ev. 169, 362, 364, note. 11 John. 64.)

3. The motion for a nonsuit was properly denied. When the plaintiff introduces a deed conveying the premises from a person of the same name with him, who afterwards conveys, it is, *prima facie*, evidence that such person is the real grantee, and throws the burthen of proving the contrary on the defendant. (13 John. 518.)

4. The testimony of Durham puts the fact of the execution of the deed from Blanchard and wife to Danforth, beyond a doubt; and it was competent evidence in this cause, and taken without objection. (1 Phil. Ev. 372. 14 East, 328. 7 East, 282, note.)

5. Even if the sufficiency of the testimony in relation to the conveyance purporting to have been executed by Patterson, should have been left to the jury; yet the defendant waived his right to complain of this, by not insisting upon its being submitted to the jury; and a new trial should not be granted for that cause. (2 Dunl. 679. id. 640. 1 Taunt. 10. 5 Cowen, 127. 13 John. 523. 2 Phil. Ev. 13. 13 John. 504.)

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*6. The defendant not insisting on going to the jury, waived the objection taken by him; and the charge of the judge was correct.

The counsel also cited 19 John. 80, and 20 John. 478.

Curia, per SUTHERLAND, J. The patent to William Patterson, for lot number 48 in the town of Cicero, in the county of Onondaga, of which the premises in question are a part, was duly proved. It bears date on the 18th of Sept. 1790, and passed the secretary's office the 21st day of March, 1792.

An exemplified copy of the balloting book belonging to the office of the clerk of Cayuga, and filed in that office pursuant to the statute, was also produced and duly proved; from which it appeared, that William Patterson

drew the lot for his services as a soldier in the revolutionary war, and that the lot was patented to him the 13th of September, 1790. He is described in the balloting book as a private in Hazen's regiment. The plaintiff next produced a deed for the lot purporting to have been executed by William Petterson, describing him, however in the body of the deed, as William "Patterson, late a soldier in the revolutionary war, in Hazen's regiment," to John Blanchard of the city of New York, gentleman, bearing date the 6th day of December, 1790. This deed was duly acknowledged, and was recorded in the clerk's office of Onondaga county, on the 8th of June, 1808. It was objected to as not being from William Patterson, the patentee, but from William Petterson. The objection was overruled, and this presents the first point in the case.

In *Jackson ex dem. Miner v. Boneham*, (15 John. 226,) the name of the soldier to whom the patent was issued, was Moses Minner. The lessors claimed as heirs at law to Moses Miner, and proved that their ancestor was a soldier in the New York line. The court say, "the only difficulty in the case arises from the name being spelled Minner instead of Miner. It is evident that the soldier under whom the lessors claim, wrote his name Miner; and if it had been shown that there had been in the army any man by the name of Minner, the patent would be deemed to have issued to him. But nothing of that kind appearing, it must be considered a mere misspelling of the name, which cannot affect the identity of the person; nor is it such a difference in the spelling as to make it a distinct name." The difference in sound between the two names in that case, as they are ordinarily divided and pronounced, is greater than in the case now before the court. The letter *e* is often pronounced broad like *a*, and the two names when spoken by the mass of ordinary men, in common and rapid conversation, would be pronounced alike. In *Jackson v. Boneham*, there was no identification of the soldier for whom the patent was intended, except his name. The regiment or company to which he belonged was not shown. In the case at bar, the balloting book, (which is the authority on which the patent issues,) describes the

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soldier for whom it was intended, as a private in Hazen's regiment; and the deed describes the grantor therein, as William Patterson, late a private in Hazen's regiment; leaving no doubt that the grantor meant to represent himself as the person to whom the patent had issued; and it not having been shown that there was any soldier in that regiment by the name of Patterson, I am of opinion that the evidence of identity was, *prima facie* sufficient. The cases of Jackson v. Stanley, (10 John. 133,) Jackson v. Hart, (12 John. 77,) and Franklin v. Talmadge, (5 John. 84,) have also some bearing on this question.

It would have been competent for the defendant to have shown, that the grantor in the deed to Blanchard was not the patentee intended by the grant from the state. (Jackson *ex dem.* Shultze, v. Goes, 13 John. 518.)

2. The deed from Blanchard and wife to Asa Danforth was objected to, as not having been sufficiently proved. It bore date of the 27th of March, 1792, and was witnessed by John Durham and Phineas Pierce.

It was proved that Pierce left the state more than twenty years before the trial, and was said to have died; and his hand writing was proved. The deed describes the grantors as being of the city of New York. It was proved that diligent inquiry had been made there for the other witness, Durham, and that he could not be found, nor any trace of him discovered there. But the witness subsequently learned *that a man of that name once lived in the city of New York, and afterwards in Newton, Tioga county, where he died. He had also a son of the same name, who died at Newton about a year before the trial. Benjamin Durham testified that his grandfather's name was John Durham, that he had lived in New York, as the witness understood, and died previous to 1804. The witness' father's name was also John Durham, and he was dead. He also produced an instrument purporting to have been executed by John Durham, which the witness understood to be his grandfather's hand writing. It had been long in his possession; and he had no other knowledge of his grandfather's hand writing than from that instrument. From such knowledge, the witness testified, that he believed the hand

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writing subscribed to the deed from Blanchard and wife to Danforth, was the hand writing of John Durham, his grandfather.

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The defendant proved that there were, within a few years before the trial, two men of the name of John Durham living within this state, of the age of between 50 and 60. It also appeared, that there were two men of the name of John Blanchard residing in New York in 1792; and the defendant claimed under a deed from one John Blanchard to Justus McKinstry, bearing date the 7th of November, 1817. The grantor was described as *being late of the city of New York*; and, in addition to the objection to the proof of the plaintiff's deed from John Blanchard, it was contended that he was bound to identify the John Blanchard under whom he claimed.

It was undoubtedly necessary for the plaintiff to show, with reasonable certainty, that Durham, the other witness to the deed, was either dead or beyond the jurisdiction of the court. [1] Proof that he could not be found or heard

[1] If a witness cannot be found after diligent inquiry, it is the same as if he were dead. *Jackson v. Chamberlain*, 8 Wen. 620. *Spring v. The South Carolina Co.*, 8 Wheat. 269. Or, if he is out of the jurisdiction of the court, it is sufficient to authorize proof of his hand writing. *Teall v. Van Wyck*, 10 Barb. 376.

As to what shall amount to diligent inquiry, see per *TRACT*, Senator, in *Jackson v. Waldron*, 13 Wen. 199. *Petterean v. Jackson*, 11 *id.* 110, 111, 123. Per *KENT*, C. J., in *Jackson v. Beerton*, 11 John. 65. *Conrad v. Farrow*, 5 Watts, 537. *Cunliffe v. Sefton*, 2 East, 183. *Crosby v. Percy*, 1 Taunt. 365. *Morgan v. Morgan*, 9 Bing. 359. *Evans v. Curtis*, 2 Carr. & P. 296. The rules and practices of the court leave this point latitude of discretion, 11 John. *supra*, and this discretion is the subject of review, 13 Wen. *supra*. In 2 Cowen. & Hill's notes to Phil. Ev. 382 *et seq.* this subject is treated at length, and a synopsis of all the judicial decisions thereon given.

The necessity of actual inquiry may be superseded by presumptions arising from circumstances. Thus when an attested instrument is executed in another state, the witness is presumed to be beyond the jurisdiction of the court. *Barfield v. Hewlett*, 4 Mill. Low. Rep. 118. *Crouse v. Duffield*, 12 Mart. Low. Rep. 539.

In some cases the amount of diligence required, depends on the value of the instrument. 1 Taunt. 364, 5, 6. But this distinction has been repudiated by Lord Ellenborough. *Wardell v. Fermor*, 2 Camp. 282, 284. But an evident design of the witness to withhold his testimony from the party seek-

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of, upon diligent search or inquiry, would be evidence of his death or absence.

If the testimony of Benjamin Durham was admissible, (and it was not objected to,) it identifies the witness to the deed, as his grandfather, who died previous to 1804.

I am inclined to think his testimony was admissible for that purpose. He was in possession of an instrument in the hand writing of his grandfather; and, from the knowledge of his hand writing, acquired from that instrument, which had been long in his possession, he believed the hand writing to the deed from Blanchard to Danforth to be his grandfather's. If so, his grandfather was the witness to the deed, and being dead, the proof of the hand writing of the other witness was sufficient. [1]

But whether competent or not, as it was not objected to, it must be considered as received by consent.

As to the identity of Blanchard, the grantee from the soldier, and the grantor in the deed to Danforth, the rule as laid down by Judge Spencer, in *Jackson v. Goes*, (13 John. 523,) is this: "Whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is *prima facie* evidence that the lessor is the real grantee. The burthen of disproving this, and repelling the presumption, is thrown on the defendant; and he may prove that it was granted to a different person of the same name." But it is not sufficient for him to prove that there

ing it, will determine in many cases, as to the necessity of further inquiry. *Baker v. Blount*, 2 Hayw. 404. See *Kay v. Brookman*, 8 Carr. & P. 656, 2 Cowen & Hill's notes, 385. Especially if there be good reason to suppose it is attributable to collusion with the other party. *Mills v. Twist*, 8 John. 121. *Hill v. Phillips*, 5 Carr. & P. 359. And this, if clearly shown, is sometimes, in itself sufficient. See *Prytt v. Moore*, 6 Moore, 539. Per *HEATH J.*, in *Gipson v. Minet*, 1 H. Black. 628. Per *HATWOOD*, in *Ingram v. Hall*, 1 Hayw. 207. Hearsay is evidence of death, subject precisely to the same rules and restrictions as in relation to pedigree. See *Fosgate v. Herkimer, Man. & Hydraulic Co.* 12 Barb. 353, 358. An obituary notice, in a news-paper published in this state is not evidence of a death of a person in another state. S. C. 9 ad. 287.

[1] See *Jackson v. Brooks*, 8 Wen. 426. S. C. 15 Wen. 111. *Stothard v. Lucas*, 6 Peters, 769. *Jackson v. Kip*, Anth. N. P. 105. See further, 2 Cowen & Hill's notes to Phil. Ev. 493, Note 280.

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was another person of the same name. He must prove that he was the person to whom the grant was made; otherwise the *prima facie* evidence of the plaintiff is not repelled.

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It must be entirely immaterial, whether the question of identity relates to the lesser, or to a previous grantee from whom the lessor derives his title. The rule laid down in *Jackson v. Goes* is expressly recognized and reiterated in *Jackson v. King*, (5 Cowen, 241.)

The defendant cannot now object the doctrine of *Wendell v. Wadsworth*, (20 John. 659,) that the *deposit* of the deed from Blanchard to Danforth was *not* notice to subsequent *bona fide* purchasers. The question of notice was not raised at the trial. If any objection had been taken by the defendant on that ground, *non constat*, but actual notice might have been brought home to him.

The counsel were not precluded from going to the jury. The case states that the counsel for the defendant rose to address the jury, when the judge stated his views of the case, and remarked, in conclusion, that he should charge the jury that the plaintiff was entitled to recover five ninths of the premises in question; upon which the defendant's counsel omitted to sum up the cause. This was a voluntary, not a compulsory relinquishment of his right to address the jury.

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The motion for a new trial must be denied.

New trial denied.

NORRIS against DURHAM.

ASSUMPSIT, tried at the Madison circuit, March, 1827, before WILLIAMS, C. Judge.

A motion in arrest of judgment must be noticed for some days

within the four first days of the term next after the trial. If noticed for a day after that, it comes too late, and cannot be heard.

A motion in arrest was made, on the ground that the 4th count of the declaration was defective in not stating any promise which was true as to the declaration served; but the draft of the declaration, and the *non prime record* con-

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The declaration contained four special counts on an assumpsit by the defendant to transport boards on the canal to Albany within a certain time, which he neglected to do. The 5th count was the ordinary one in assumpsit, against the defendant as a common carrier.

The proof at the trial was, that the defendant engaged, in writing, to convey the boards within a certain time; but was prevented, and the boards were detained by the freezing of the canal.

The defendant moved for a nonsuit, on the ground of a variance between the contracts stated in the several counts, and the one proved. The motion was overruled.

The defendant then moved that the plaintiff be compelled to elect which count in his declaration he would rely upon. This motion was also overruled.

The defendant then gave proof calculated to show that the time of transportation in the special contract set out in the declaration and proved in evidence was, subsequent to
[*152] *the first contract, enlarged by parol, on condition that the freezing of the canal should prevent the transportation within the time mentioned in the original contract.

The judge charged, that if the jury found the extension of the time, then the defendant was liable as a common carrier under the 4th count, and the question would be one of diligence.

Verdict for the plaintiff.

In the copy of the declaration served on the defendant, no promise was laid in the 4th count.

At the last February term.

clause. The motion was denied as coming too late; but the court said, if in season, they would have allowed an amendment.

Where one of several counts is bad, and the verdict general, judgment will be arrested, unless it be amendable by the judge's notes, so as to apply the verdict to the good counts. This may be done on hearing the motion.

In assumpsit, where the plaintiff declares in several counts, he cannot be compelled on the trial to elect which count he will proceed upon.

Where the declaration contains counts upon a special contract unexecuted, which is proved, and an extension or alteration of the contract is shown, the plaintiff cannot recover at all, because of variance.

Four counts were on a special contract to carry, and the 5th against the defendant as a common carrier. The special contract to carry being proved, and evidence given to vary the terms of it, *held*, the jury should be charged that if they believed the parties had varied the terms of it, they should find for the defendant; for he would not be liable as a common carrier, but only on the special contract.

S. L. Edwards moved in arrest of judgment, for the defect in the 4th count; or for a new trial, on the ground of variance between the declaration and proof; and because the judge should have compelled the plaintiff to elect between his counts; and also for error in the charge.

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Notice of the motion in arrest was not given till after October term, 1827.

J. A. Spencer, contra.

Curia, per SAVAGE, Ch. J. The motion in arrest of judgment came too late. Notice should be given of such a motion within the four first days of the term next after trial. Here notice was first given for the fourth term.

But, under the circumstances of the case, had the motion been made in season, we would allow an opportunity to amend, as it appears the assumpsit clause in the fourth count was in the draft of the declaration, and in the *nisi prius* record.

The questions on the case are, *first*, as to the variance. Though the first three counts are not drawn as artificially as they might have been, yet I incline to the opinion expressed by the judge at the trial, that the evidence supports them all. I think it more particularly applicable to the third.

The judge was right in refusing the nonsuit; and I know of no practice compelling the plaintiff to elect, on the trial, *which of his counts he will apply the evidence to in this action. Where there are several counts in the declaration, and one bad, upon a general verdict, judgment will be arrested unless the verdict can be amended by the judge's notes, so as to apply it to the good counts; and it is not too late, on a motion in arrest of judgment, for the plaintiff to move for such amendment. (1 John. 506. 11 John. 100.) [1]

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[1] *Burhans v. Libbits*, 1 How. Pr. R. 21, 23. *Sayre v. Jewett*, 12 Wen. 135. *Postly v. Mott*, 3 Denio, 354. *The Union Turnpike v. Jenkins*, 1 Caines, 392. *Hopkins v. Beedle*, *id.* 347. A justice of peace has the same power to allow amendments in cases pending before him as is possessed by courts of record. *Mosher v. Lawrence*, 4 Denio, 419.

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Was there any misdirection by the judge? The action was upon a special contract, and that contract was proved. The plaintiff must, therefore, recover upon that contract, or fail in his action. There is no ground for resorting to a common count. If the plaintiff has no special count under which his special contract can be received in evidence, he must be nonsuited.

So if the jury believed that the plaintiff subsequently extended the time, then the boards were carried under a different contract than that declared on, and the plaintiff could not recover at all: not on the special counts, because of the variance; not on the common counts, because there was a special agreement. (Bull. N. P. 139. 4 B. & P. 355.) I think, therefore, the judge erred in instructing the jury to find a verdict on the common count.

A new trial should be granted; the costs to abide the event.

New trial granted.

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*STONE *against* HOOKER.

A promise to indemnify against a trespass is valid, unless the promisor show that the promisee knew the act to be a trespass, and illegal.

ASSUMPSIT, tried at the Jefferson circuit, on the 20th of December, 1826, before WILLIAMS, C. Judge, when a verdict was found for the plaintiff.

A promise to indemnify one against a trespass includes an authority to the promisee to employ and indemnify agents; and if he is compelled to pay such agents damages recovered against them for the trespass, he may recover over against his promisor, the same as for damages paid by the promisee directly, to the person trespassed upon.

Where such agents were severally sued by the person trespassed upon, the original promisor having notice, one of them after trial and recovery against another, gave a cognovit in his own suit, and paid, and his promisor paid him; *held*, the agent appearing to have acted in good faith, that the original promisee might recover the amount of what he thus paid.

A warrantee of land may abandon possession without suit; and if the title be in fact defective, may still recover against his warrantor; but the burthen of proof, as to want of title, lies in such case, on the warrantee. *Per cur arguendo*, on the authority of *Hamilton v. Cutts*, (4 Mass. Rep. 349.)

One promises to indemnify another against a trespass. On suit for the trespass, the latter gives a cognovit. The burthen lies with him to prove the cognovit was not for too much. So if the agent of the latter give a cognovit for a sum which his principal pays.

C. P. Kirkland, now moved for a new trial.

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S. Beardsley, contra.

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Curia, per WOODWORTH, J. The plaintiff declared in assumpsit, on a promise to indemnify him to take possession of a fishing ground in possession of one Mason.

The promise was sufficiently proved.

It appeared at the trial, that the plaintiff was employed by the defendant to take possession; that he engaged a number of persons under him; that possession was taken in a peaceable manner by drawing the seine around it; that no damage was done to any person or property; that after they had taken possession, Mason came and attempted to cut their ropes; that they resisted and prevented him from destroying their seine, but did no injury to him or his property. Evidence was offered, to show that one Hounsfield was the reputed owner, and the defendant the reputed agent, and that the plaintiff so considered him; but the promise was express by the defendant that he would indemnify; and no evidence was adduced to prove the fact of his agency. General reputation was alone relied upon.

It appears to me, that the plaintiff looked to the defendant for indemnity; and that it was intended he should be finally responsible.

*Mason sued Stalen and Winch, two of the persons concerned with the plaintiff, and recovered. Stalen sued the plaintiff and recovered on his (the plaintiff's) promise of indemnity. This judgment the plaintiff paid. Mason also sued E. Sawyer and E. Sawyer junior, for the same cause, and obtained judgment by confession, for \$149 79, damages and costs. This judgment was objected to, on the ground that it was by confession. The counsel for the plaintiff and defendants in this last suit were examined as witnesses; and by their testimony it appeared that all the suits commenced by Mason, depended on the same facts and the same principles of law; that after the first suit was tried, it would have been a useless expense to contest the others; and that if the cause had been tried, a greater sum

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would have been recovered than the amount of the cognovit. It also appeared that the defendant had notice of the causes; and was requested to attend to the defence; but did not.

The plaintiff then produced the record of the recovery of a judgment against him, in favor of E. Sawyer, for \$142 44 damages, and \$40 56 costs, founded on the promise of the plaintiff to indemnify him for the trespass. This judgment the plaintiff had paid.

The jury found a verdict for the plaintiff.

The promise to indemnify being established, and that promise relating to, and binding the defendant personally, there remain two questions to be considered;

1. Whether the promise was to indemnify against an unlawful act? If not, then,

2. Whether the defendant is liable in consequence of the recovery of the judgment of Mason against the Sawyers; that judgment having been obtained by confession?

As to the first, it is quite clear that the promise is valid. In *Coventry v. Barton*, (17 John. 142,) the law in relation to this point appears to be fully settled. The distinction taken between promises of indemnity that are, and those which are not void, is this: If the act directed or agreed to be done, is known at the time to be a trespass, an express promise to indemnify would be illegal and void; but if it was not known at the time to be a trespass, the promise of indemnity is a *good and valid promise. [1] For this, Cowp. 343 is cited. So also in *Allaire v. Ouland*, (2 John. Cas. 54,) a similar principle is recognized. One point there decided was, that where the principal directed his servant to enter into the *locus in quo*, claiming and declaring it to be his own, and the servant, relying on the truth of the declaration, did enter, but in fact the *locus* belonged to another person, and the entry was a trespass, yet the act of the servant was lawful, and a good consideration for the promise to indemnify.

In this case there is no evidence to show the plaintiff

[1] *Kneeland v. Rogers*, 1 Hall, 579. *Compston v. Lambert*, 18 Ohio Rep. 81, 85.

knew that the entry would be a trespass, nor that Mason had any well founded claim to the premises. He is consequently entitled to the protection afforded by the defendant's promise.

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The next point is, as to the recovery of the judgment by *cognovit*; and here, it seems to me the question is, has enough been shown to satisfy the court that Mason was entitled to so large a recovery? This is undoubtedly necessary for the plaintiff to show. That Mason was entitled to a judgment, we may well presume; for on the same state of facts he had previously recovered in a court of competent jurisdiction, a judgment against a co-trespasser. The counsel for Mason testified, and was not objected to, that if the cause had been tried, a larger sum would, in the opinion of the witness, have been recovered. No contradictory proof was offered. The defendants in that cause acted with good faith. They availed themselves of the most favorable terms as they supposed; such terms as they undoubtedly would have acceded to, had there been no claim of a recovery over. The defendant in this cause, although notified, appears to have abandoned the defence. Under all these circumstances, were not the defendants warranted in taking the course they did? I think they were, inasmuch as, in the absence of counter proof, it may be fairly presumed that the acceptance of a *cognovit* by Mason for \$100, the amount of damages, was more favorable to the defendant than a trial, had it taken place.

On principle then, this must be considered as obligatory on the defendant; it satisfactorily appearing that Mason's claim for damages more than equalled the *cognovit*.

*In *Hamilton v. Cutts and others*, (4 Mass. Rep. 349,) the action was on a covenant of warranty of lands. The plaintiff had permitted the person who claimed the land to take possession on the ground of a paramount title; and then prosecuted the representatives of his grantor, to recover damages. There had been no evidence of a legal ouster. Chief Justice Parsons, in giving the opinion of the court, answers the objection by saying "the tenant may yield to a dispossession without losing his remedy on the covenant

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of warranty. There is no necessity for him to involve himself in a lawsuit, to defend against a title which he is satisfied must ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good he must abide the loss; and in a suit against his warrantor, the burthen of proof will be on the plaintiff."

This doctrine appears to me to be sound, and applicable to the case under consideration. The defendants in the suit commenced by Mason, were not bound to go through the form of a trial, which there is ground to believe would have resulted in a heavier judgment. It is admitted that the *cognovit* was given at their peril, so far as respects the question of a recovery over. The burthen of proof lies with the now plaintiff, to show that, under the circumstances of the case, the step taken did not exonerate the defendant. I think he has done so; and that the motion for a new trial must be denied.

New trial denied.

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*VAN BEUREN and SANDS *against* WILSON.

Wages cannot, in general, be recovered by a seaman where no freight has been earned, and there is no fault of the master or owners occasioning the failure.

IN error on certiorari, to the marine court of the city of New-York. Van Beuren and Sands were sued below by Wilson, who declared in assumpsit for wages due him as a

It is not sufficient to entitle seamen to wages that the freight be lost without their fault. It must be owing to the fraud or other wrongful act, or some fault of the master or owner: or at least some act or omission on the part of the master or owner, over which the seamen can have no possible control.

The defendants shipped the plaintiff, a seaman, on a voyage from New York to Newry, in Ireland, and thence back to a port in the United States: and the vessel was libelled in the Irish admiralty by one pretending to be owner, and the crew turned ashore, and discharged by the captain. The vessel was detained more than a year and was finally restored; but, in the meantime, had become so much deteriorated as to be unworthy of repair, and was abandoned in Ireland to the underwriters, and never returned to the United States. *Held*, that this was not the exercise of that superior force over the vessel, which should exempt the owners from liability to pay the plaintiff his wages, or damages for discharging him from the return voyage; and *held*, also, that the master and owners were not entirely free from fault; that they were bound to understand and risk their title; or, if it was contested in a mere civil proceeding, to take effectual means for liberating it, if possible, on security, *pendente lite* so as to prosecute the voyage, and enable the vessel to earn freight.

An action will not lie at the suit of a seaman against the owners, under the act of congress, (7 Cong. sess. 2, ch. 62, § 8.) And see *Ogden v. Orr*, (12 John. 143, S. P.)

seaman on board the brig Charlotte, of which the defendants were owners ; also for damages in discharging the plaintiff in a foreign port, against his will ; also for work and labor done and performed, money paid, laid out and expended ; also for two months' wages due the plaintiff by statute, for being discharged in a foreign port, and the vessel being sold.

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The defendants below pleaded the general issue, and payment, and gave notice of special matter.

The cause was tried February 16th, 1827. The parties admitted that the plaintiff below, on the tenth day of February, 1824, shipped as cook on board of the Charlotte, to perform a voyage from the port of New-York to Newry, in Ireland, and from thence to another port, and back to a port of discharge in the United States ; and that the defendants were the owners of the brig. That the plaintiff was on board of the brig from New-York to Newry, at fourteen dollars per month ; and that the vessel arrived at Newry, and delivered her cargo. That then she was libelled by one Forrest, in the court of admiralty in Ireland, some time in the month of March, 1824, as the property of Forrest, claiming to be her owner. That the crew were then turned ashore by the proctor of the admiralty court, and the captain took a place *on shore, where the plaintiff still continued to do his duty, at the captain's request. That on the 27th of April, 1824, the sum of \$26 42, was paid the plaintiff, and a receipt given for services performed on board, from New York to Newry. That the vessel was detained in the custody of the admiralty, until some time in October, 1825, when, by a decree of the court, she was ordered to be restored to the captain and owners ; which restoration was prevented by a mob, and the captain was killed. That the vessel had then become so deteriorated as not to be worth repairing, and was sold in Ireland and never returned. The owners abandoned her to the insurers, who compromised with the owners. The voyage was broken up, and no freight was earned on the return voyage. The freight earned on the voyage out was \$1800. The amount of the freight and vessel was consumed in expenses,

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in Newry, in the litigation. If any thing in the nature of wages, compensation, damages, or allowance, was due the plaintiff for services, and for being discharged in Newry, it was admitted that the amount of the same should be \$45, to wit, \$28 for time, and the balance, being \$17, for his expenses in returning to New-York.

Thomas Cahill, sworn for the plaintiff below, said the captain discharged the plaintiff below at Newry, on the 27th of April, 1824. The captain insisted upon the plaintiff's signing the receipt in evidence, or he (the captain) would not pay him (the plaintiff) a cent; and if the plaintiff would not take it, the captain would not pay him any thing. The witness said he had a suit for a similar demand in the common pleas, as one of the crew of the same brig. That the captain said he would not pay the three months' pay allowed by statute, into the hands of the counsel at Newry, or make any compensation other than that mentioned in the receipt. The court below gave judgment for the plaintiff for \$45 damages and the costs.

D. Lord, jun. for the plaintiffs in error. The services of the plaintiff below being terminated on his discharge he could recover nothing for work done; nor could he for money paid, since his expenses were neither at our request, nor for our account; nor could he recover as having fulfilled the contract of service, since the voyage was broken up.

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The plaintiff below could not recover any thing from the owners under the act of congress of February 28, 1803, § 3, (Ingersoll's Dig. 1st ed. p. 146.) *Ogden v. Orr*, (12 John. Rep. 143,) is conclusive upon this point.

It may be added, too, that the act relates to a voluntary discharge, and not to one where the voyage is broken up through necessity; or to a *sale of a ship*, or to the discharge of a seaman *with his own consent*; and the penalty of the payment is on the *master*.

Under the principles of commercial law, by which this question must be judged, the plaintiff below can recover nothing.

Freight is the mother of wages; and where, from the failure of the voyage, no freight is earned, no wages are due. (Abbot on Ship. pt. 4, ch. 3, § 1. *Dunnett v. Tomhagen*, 3 John. Rep. 154. *Icard v. Gould*, 11 John. Rep. 279. *Wetmore v. Henshaw*, 12 John. Rep. 324.) In the case last cited, there is a full discussion upon the law of seamen's wages, by Justice Thompson.

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This rule often operates for the seaman. He may not complain when it operates against him. If sick, so that he is a burden instead of a benefit, by virtue of this rule he receives wages. If captured, and the vessel be navigated by a new crew, and earn freight, he receives wages without deduction; and this, by mere force of the rule, without regard to the policy on which it is founded; because, being separated from the ship, his interest in its safety, or in the performance of the voyage, can avail nothing to the owners. (See 12 John. Rep. 324, and *Girard v. Ware*, 1 Peter's Circuit Ct. Rep. 142.) So, during a long embargo, he receives wages, according to the ultimate earning of freight, for a period when he renders no service. (*Beale v. Thompson*, 4 East, 546.)

It is, therefore, entirely just to apply the rule on the other side. Accordingly, if, by capture, the voyage is defeated, and no freight earned, no wages are due. So when the vessel, being seaworthy when she sets out, becomes unseaworthy during the voyage; no freight being earned; no wages, "even for the period of service, are due. (*Porter v. Andrews*, 9 John. Rep. 350.) In the case cited, the court say, "There is no case to be found which allows wages where no freight is earned, and when the loss of the voyage is not to be imputed to the default of the master or owner." (See also *Hindman v. Shaw*, 2 Peters' Adm. Dec. 264.) And where a ship was seized in a foreign country, and there condemned for a breach of its laws, wages after seizure were denied. (*Oxnard v. Dean*, 10 Mass. Rep. 143.)

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Now in the present case, the voyage was defeated without the fault of the master or owner. No homeward freight was earned, and therefore, no wages were due, the wages

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to the time of discharge being paid. And if no wages are due, it is but a subterfuge here to say that any thing is due in their stead.

The owner cannot be made liable for the discharge of the mariner.

The seizure of the ship, under the claim of property, was no fault or misconduct of the owner; and by the decree of restitution, which was conclusive as to the title, his right is affirmed, and he presented faultless on this score.

The being subject to unjust claims and lawsuits is a contingency; one of the chances to which, in some form or other, all things are subject. By it, the pursuing of the voyage was frustrated, the owners were prevented from employing the ship, the mariners from rendering any services to it. By the detention, not the fault of the owners, the ship becomes lost, no freight is earned, no fund is created for the payment of wages, a common loss takes place. The owners lose the ship: they also lose the freight; they lose, in expenses, the freight which they had already received, and much more; the captain loses his life; the crew must lose their wages. If it is said that the ship being the owners', any loss of the voyage growing out of its condition ought to fall on them, it is replied, that in case of capture, shipwreck, or supervening unseaworthiness, the misfortune is directly and primarily that of the ship; while it is consequentially, but certainly, the loss of the seamen.

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*Was there any fault in the master's discharging the crew, under the circumstances, after waiting as he did? Was he to detain the crew in idleness, and at a ruinous expense, for which he could not be reimbursed for the indefinite period of a litigation in the admiralty in Ireland, concerning the property of an American vessel? Was it not correct in him, as soon as he saw the probable delay, to discharge his crew, who, if they had remained during the twenty-one months' detention, would at last have lost their wages, because the ship became ruined by the delay, and could not earn freight home? Did the master, in this, break his contract, so as justly to deserve an award of damages against him

and his owners, by setting the mariners free, when he found that it was impossible either for them to serve the ship, or for the ship to provide for their support or their wages? In fine, was there ever, or can there be, a juster case for the application of the general rule of community of loss from common misfortune? In the language of the court in *Icard v. Gould*, "No freight was earned; and, as in case of loss by piracy, the seamen and owners must be deemed common sufferers. Wages cannot be exacted by the unfortunate seamen from the still more unfortunate owners."

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I. Clizbe, contra, relied on *Woolf et al. v. The Brig Oder*, (1 Pet. Adm. Dec. 261,) as sustaining the claim of the plaintiff below. It was (he said) a case somewhat similar to the present. The brig was seized for the debts of the owner, in a foreign port. A claim was made for wages, *pro tanto*, and allowed. Two months' pay in addition was also claimed, and damages for the board and expenses of the seamen; but the court, not being satisfied that the seamen were residents of, and intended to return to another country, allowed only one month's pay additional.

In the case cited, the principle on which the claim of the present plaintiff below is founded, is established; and although the amount allowed is less in that case than the judgment in this, that fact does not affect the question, as it was the effect of a circumstance which does not exist in the present case. It is admitted that the plaintiff below has in fact sustained damage by being discharged in Newry, and that damage is fixed at \$45. His damage was, in fact, occasioned by the act of a third person; and it is a maxim in law, that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss, must sustain it. (*Lickbarrow v. Mason*, 2 T. R. 70.) The defendants below in this case gave the occasion for the act of the third person, which caused the loss.

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But in this case the defendants below are not innocent; for the vessel was libelled on a claim which had some four

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dation, or had none; if there was a foundation, it must have been created by some act or neglect of theirs. The controversy was for the title or ownership of the vessel. The plaintiff below could not by possibility have any agency in putting the title of the brig in question. There was nothing analogous to the *vis major*, or inevitable necessity, or peril of the sea, or destruction by the elements, the usual case in which it is admitted that seamen lose their wages; but a simple civil proceeding *in rem* by a citizen of a foreign country against the property of a citizen of this. The seizure of the vessel was not one of those casualties, the risk of which seamen are understood to run, and with an understanding as to which they enter into their contracts of service. It was a misfortune which no remissness and no imprudence or negligence of *theirs* could have caused, and against which no care and diligence of theirs could guard.

The claim of the citizen instituting proceedings (if colorably founded at all) must have been on the ground of original ownership, or of a conveyance, either by bill of sale, mortgage, hypothecation, bottomry, respondentia, recognizance or statute, or on the ground of indebtedness by the owners and the process of attachment against their property accidentally found in a foreign country; each of which supposes some act or neglect of the owners, and renders them not legally innocent.

Again, it is perfectly evident that the defendants below ought to have known that their title to the vessel was clear and unimpeachable before contracting with the plaintiff, and subjecting him to so injurious a hazard as that of being discharged *in a foreign port, where the damage to him might be most serious.

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Suppose the defendants below had, immediately on the arrival of their vessel in Newry, confessed a judgment to a creditor residing there, under which the sheriff of the county had come and taken possession with the *posse comitatus*, and turned the crew out of the vessel: could it be endured that this should be called a taking of the vessel by a *vis major*? and where is the difference between such a

supposition and the fact? (Woolf et al. v. The Brig Oder, 2 Pet. Adm. Rep. 261.)

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But if the claim of the libellant was without colorable foundation, it is still more clearly apparent that the defendants below do not stand on such an equality of situation with the plaintiff, as to subject him only to the loss. In that case, the libellant and all concerned with him were trespassers and liable to answer to the owners in damages for all the loss they might have occasioned. While the discharged and injured mariner could only look to his owners for reparation, they could in fact recover, in their action of trespass, their own damages, and the damages of that very mariner; and for anything that appears in the case, the owners may have prosecuted such an action, and may have recovered in it the very damages for which the mariner is now contending. At all events, it does appear from the case, that the defendants below succeeded in the action brought by the libellant; their vessel was decreed to be restored to them, and the expenses therefore must have been decreed to them also; and as they afterwards abandoned to the underwriters, and were paid by them for their vessel, they have in fact lost nothing, while the loss of the plaintiff below is admitted to be \$45.

The plaintiff below was discharged very soon after the libelling of the vessel, and long before it was or could be known whether she would be condemned as unseaworthy or abandoned to the underwriters, or earn freight on her return voyage; and the only ground on which she was ultimately abandoned was, the injury she sustained from the delay and protractedness of the litigation, (which, as has already been shown, must have arisen from the act or neglect of the defendants below.) The right of action of the mariner accrued on the discharge, and the equities of the parties must be determined from the facts which had previously transpired. Subsequent acts, unless by new agreement can exert no control over their rights, no more than could those which existed previously to the first shipping. (1 Pet. Adm. Dec. 186, 7, note.) The relations of the parties ceased on the discharge, (1 Pet. Adm. Dec. 203,

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215, 254,) and the after unseaworthiness of the vessel could not affect the sailors. She was seaworthy when they were discharged. It is only where freight is lost by disaster, as loss or capture, that seamen lose their wages. (*Hoyt v. Wildfire*, 3 John. 520.) Besides, the owners might have redeemed their vessel, by giving security to abide the event of the litigation, and so avoided the loss of her by the long delay.

Seamen are entitled to their stipulated wages, if they have been guilty of no fault by which their wages would be forfeited, although the voyage is not performed. (*Hoyt v. Wildfire*, 3 John. 520, 522, note and the cases there cited. 1 Pet. Adm. Dec., 182.)

If the defendants below had wished to avoid this action, they should have complied with the requisitions of the statute, and paid the 3 months' wages into the hands of the consul at Newry. If they were not liable in this action, the provisions of the statute are virtually nugatory; for the vessel was finally sold in Newry. (Act. of Cong. of 28th February, 1803, 6 U. S. L. old ed. 206. 2 Pet. Adm. Dec. cxxv. cxxviii.)

Curia, per SUTHERLAND, J. No general principle of commercial law is better settled, than that no wages are allowed to seamen where no freight is earned; unless the loss of the voyage and freight is to be imputed to the default of the master or owners. It has accordingly grown into a legal maxim, that freight is the mother of wages. (*Abbott on Ship*. pt. 4, ch. 3, and cases there collected, 3 John. 154, 11 John. 279. *Whetmore v. Henshaw*, 12 John. 324.) In the last case, this question is elaborately discussed by the counsel and by the judge, who delivered the opinion of the court. See also 9 John. 350; 1 Peters, Adm. Rep. 142; 2 id. 264; 10 Mass. Rep. *143.) The rule is founded on considerations of policy, growing out of the peculiar nature of the service; and is intended to give to seamen the strongest inducements to exert themselves to the utmost, for the safety and preservation of the ship. (1 Sid. Rep. 179.)

The rule being admitted, the question in this case is.

whether the loss of the return voyage, and consequently of the freight, was owing to the default or misconduct of the owners or master of the vessel.

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The vessel, after the discharge of her cargo at Newry, was regularly libelled in the Irish admiralty court, in March, 1824, by one Forrest, who claimed to be the owner; and the captain and crew were turned ashore by the proctor of the court. The captain provided for the crew until the 27th of April, when he paid them their wages to that time, and discharged them. The vessel was detained in the custody of the admiralty until October, 1825, when, by the decree of that court, she was ordered to be restored to the captain and owners; which was prevented by a mob, and the captain was killed in the affray. The vessel had then deteriorated so much as not to be worth repairing. The owners abandoned to the underwriters; the vessel was sold in Ireland, and never returned to this country. The voyage of course was broken up, and no return freight earned.

In *Woolf and others v. Brig Oder*, (2 Peters' Adm. Rep. 261,) the vessel was seized in a foreign port for the debt of the owner; and the seamen were discharged. They were held to be entitled to their wages. This was, doubtless, on the well settled ground, that the seizure was attributable to the fault of the owner. (2 Bro. Adm. 182. Vin. Abr. *Mariners*, (E.) pl. 7. Mal. Lex Merc. 105, c. 23. Mol. B. 2. ch. 3, § 7.) So in *Hoyt v. Wildfire*, (3 John. 520,) the seamen were shipped, on a voyage from New York to Bombay. The master deviated from his course, and sailed towards the Isle of France, under pretence of being in want of water; and while thus sailing, was captured by an English frigate, and the vessel and cargo were condemned. It appeared that the want of water was a mere pretence; and the court say, "the act of the master, in sailing to the Isle of France, with articles **contraband of war*, under pretence of a want of water, was a fraudulent act; and from the testimony in the case, there is every reason to conclude, that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not

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kept with good faith. A deceit was practised upon them. The ship and freight were justly lost by a wilful violation of neutral duty, and the seamen had the soundest claim upon the owner for an equitable compensation." And the general rule is there repeated, that if freight be lost during the course of the voyage, by a disaster or peril, arising from accident or superior force, the seamen lose their wages; but, if the freight be lost by the fraud or other wrongful act of the master, the reason of the rule does not apply. It is not sufficient that the freight be lost without the fault of the seamen. The capture or wreck of the vessel may be without their fault. It must be owing to the fraud, or other wrongful act of the master or owner, or else the loss of the freight carries with it the loss of the seamen's wages.

The issue of the proceedings in the Irish admiralty court shows that the claim which was preferred against the defendant's vessel, and which caused the breaking up of the voyage, was without foundation. What color there was for it, we have no means of judging, as the result only of the proceedings is stated in this case.

But I am inclined to think, that civil process, issuing at the instance of an individual, for the purpose of trying a private right of property, is not that species of superior force which will exempt the owners of a vessel from the payment of seamen's wages, although it may break up the voyage, and prevent the earning of freight. It does not seem to fall within the policy of the rule. (Vid. 1 Sid. Rep. 179.) Every individual is supposed to know his own title to the property in his possession; and to be capable of taking the legal precautions necessary to prevent that possession from being interrupted; and the law is supposed to award an adequate compensation for the damage which may result from an unfounded prosecution, in the costs, and indeed express compensation *for loss of freight might be given in this instance to the successful party. (Vid. 3 Mason's Rep. 165, 6.) Besides, there is hardly any civil proceeding, which necessarily changes the possession of the property, the title to which is to be tried, until the final

termination of the suit. In proceedings *in rem*, to enforce a claim of the alleged owner, the defendant can probably retain the possession of the vessel, or other property libelled, or, at least have it restored, when the preservation of the property requires it, on giving competent security to return it, if finally condemned. The owners of the vessel in question, or the master, might probably, on showing proper cause, and on giving security according to the course of the court, by deposit or otherwise, have retained, or been restored to the possession of the vessel, although libelled, and have prosecuted their voyage without any essential interruption. (Clerke's Adm. Practice, tit. 41, 43.) It is no answer to this argument to say, that it was not, or may not have been in their power to obtain the requisite security in a foreign land. It is the duty of owners to furnish the masters of their vessels with the means of obtaining all the credit which the exigencies of the voyage may require. But independently of this consideration, the being subject to unfounded claims and lawsuits is a contingency, the peril and consequences of which, I think, ought to fall exclusively upon the owners. It is a matter of mere private concern, the damages or probability of which, the seamen have no means of calculating, and cannot, by any effort or exertions on their part, avert. But the perils of the seas, and the danger of capture, they can in some degree estimate, from knowing the destination of the vessel, the length of the voyage, the cargo on board, and the pacific or belligerent state of the maritime powers; and they can not only estimate the danger, and therefore exercise a discretion as to the voyages in which they will embark, but they have in their own skill, enterprise and courage, the means of diminishing, if not entirely averting it. These considerations appear to me to constitute a marked distinction between the two classes of cases.

*In *Eaken v. Thom*, (5 Esp. Rep. 4,) the voyage was broken up in its progress by the vessel being unseaworthy, without any imputed fault of the owner; and Lord Ellenborough held, that though the mate could not recover his wages, *eo nomine*, yet, he might recover damages, *in an*

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action on the case. The suit before us was so shaped, as to cover not only a claim for *wages* as such, but *damages* for omitting to furnish a seaworthy ship, and discharging the plaintiff below, in a foreign land. The amount in either view, was admitted by the parties to be the same.

The plaintiff below, therefore, was entitled to wages, or, perhaps more properly speaking in this case, damages to the amount of his wages for the return voyage.

The plaintiff below could not sustain his suit under the act of congress of February 28th, 1803, (Ingersoll's Dig. 146.) The case of *Ogden v. Orr*, (11 John. 143,) is decisive upon this point.

Judgment affirmed.

Rust against Gott.

All wagers on the event of an election are illegal and void, though made after the poll of election is closed, if before the canvass is complete.

The state canvass of an election is not conclusive, but may be inquired into by a court of law, on its

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coming collaterally in question.

On the validity of wagers generally, and bets on elections particularly, and the moral tendency of each. (Note (c) subjoined to the case.)

ON demurrer to the second plea of the defendant. The declaration was in trover for a promissory note drawn by one Luther Marsh, by which he promised to pay the plaintiff 435 dollars.

Plea, secondly, that before this suit was commenced, and shortly after the closing of the polls at the election of November, 1826, Marsh and the plaintiff, at Pompey, in Onondaga county, made a bet of \$435 upon the event of the then late election of governor of the state of New-York, they being both legal voters for governor at the time of the election, and at the time of making the bet; that the plaintiff deposited 435 dollars in the hands of the defendant, as *stakeholder, and Marsh deposited the note in question in the same hands; that the bet was made upon condition that if De Witt Clinton had been elected governor, then the \$435

It would seem, from the reasoning of the principal case, and that referred to and quoted at large in the note, that all wagers made on the event of an election, before, during or after the election, are illegal and voidable, at any time before the money or thing stated is paid over or delivered.

and the note were to be delivered over to the plaintiff; but if William B. Rochester had been elected, then the \$435 and the note were to be delivered to Marsh; that after the making of the bet, and before the event of the election of governor was generally known, and before the official canvass of votes of the election in the respective counties of the state, viz. on the 14th of November, 1826 Marsh forbade the defendant to deliver over the note, and demanded that the bet should be rescinded, and that the note should be re-delivered to the plaintiff; and that the defendant did, in pursuance of the demand, re-deliver the note to the plaintiff, and the 453 dollars to the defendant, as he lawfully might do, for the cause aforesaid; of all which the plaintiff had notice before the suit commenced; averring the identity of this note with the note declared for General demurrer and joinder.

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N. P. Randall, in support of the demurrer.

A wager is recoverable at law, unless in certain excepted cases: as where it tends to immorality, to a breach of the peace, to the injury of third persons, to the introduction of indecent evidence, to restrain the free exercise of some office of privilege, is against sound policy, &c. (*Good v. Elliot*, 3 T. R. 693. *Jones v. Randall*, Cowp. 37. *Dacosta v. Jones*, id. 729. *Earl of March v. Pigot*, 5 Burr. 2802. *McAllister v. Hayden*, 2 Camp. N. P. Rep. 438. *Hussey v. Cricket*, 3 id. 168. *Pope v. St. Leger*, 1 Salk. 344. *Bunn v. Riker*, 4 John. Rep. 426. *Campbell v. Richardson*, 10 John. Rep. 406.)

The wager in this case comes within none of the excepted cases. It is not prohibited by statute, nor is it against sound policy. It was on an election already past; and could not influence the voters, as in *Allen v. Hearne*, (1 T. R. 56,) *Bunn v. Riker*, (4 John. Rep. 426.) *Vischer v. Yates*, (11 id. 23,) and *Denniston v. Cook*, (12 id. 376.) Its object was not to bring before the public, what ought to be kept from public view, as in *Atherford v. Beard*, (2 T. R. 610.) and *Tappenden v. Randall*, (2 B. & P. 467.) It could not

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involve an inquiry into the official canvass, which is final and conclusive; and if it could, the court will not presume the possibility of ignorance, error or corruption in the canvassers, without which no evil could result from the inquiry.

Marsh could not rescind or withdraw his bet after a knowledge of the event on which it depended; and the want of such knowledge must be expressly averred in the plea, which contains no such averment, and is to be taken most strongly against the pleader. (*Yates v. Foot*, 12 John. Rep. 1. *Smith v. Blackmore*, 4 Taunton, 474. *Dunlap's Pr.* 464, and cases there cited.)

It does not appear from the pleadings that any improper inquiry will arise on the trial; and the court will not presume it, unless it does so appear; but will let the cause go to trial, and exclude such testimony if offered. (*Good v. Elliot*, 3 T. R. 493. *Atherford v. Beard*, 2 T. R. 610. *Tappenden v. Randall*, 2 B. & P. 467. *Dacosta v. Jones*, Cowp. 729.)

The defendant, a stakeholder, cannot protect himself under the principle of *in pari delicto*, &c. (*Vischer v. Yates*, 11 John. Rep. 23. *Cotton v. Thurland*, 5 T. R. 405.) He cannot interpose a plea which involves a breach of good faith or moral honesty in his principal. This is a personal privilege, which even the maker of the note might not claim. And, admitting that his principal might have avoided the payment, as of a usurious note, one barred by the statute of limitations, one given during infancy, or before a discharge under the insolvent act, *non constat*, that the maker would avail himself of any such defence.

J. A. Spencer, contra. There cannot be a doubt of the goodness of the plea, unless the court are prepared to reconsider and overrule *Lansing v. Lansing*, (8 John. 454,) which involved a bet made like this, after the election. The court put that decision on the ground that it might involve an inquiry into the election of governor. But there are other objections equally strong. The bet was made previous to the time for canvassing the votes by the

county board; and the parties interested might be led to exert a corrupt influence upon that board, with a view to produce a fraudulent determination in favor of the candidates bet upon. The result of the state election, closely contested, may depend on a single county canvass, or even that of a single town. Some bearer of votes may, by management, be defeated in his purpose of attending. Thus, even after the poll closed, the evil consequences may be much more extensive than the influence of the single vote of an elector, which is the reason why a bet with him, previous to his vote being given, is void. It is impossible to satisfy the principle of the cases and the demands of public policy, without refusing sanction to bets both before and after the election, and so on, till after the final canvass shall be published. The reasoning of three out of five of the judges in *Bunn v. Riker*, (4 John. 426,) decides this case. Suppose a failure of votes to reach either the county canvassers or the seat of government; would not this court be bound to entertain the question whether the election would be valid? If so, the case is within that of *Bunn v. Riker*. *Yates v. Foot*, (12 John. 1,) goes on the same ground; and *Denniston v. Cook*, (id. 376,) recognizes it as correct. The doctrine of bets on the event of an election was very fully discussed in *Smith v. McMasters*, (2 Browne's C. P. Rep. of the first District of Pennsylvania, 182,) and the court came to the conclusion that all wagers laid upon the event of an election are illegal and void upon common law principles, as contravening public policy. In this state, parties may carry their litigation upon the question of election, (if this kind of bet be tolerated,) to the court of errors. If good in the instance before the court, it would be good on the election of two senators, one of them would have a seat in that court. In either case, and particularly in the latter, political parties would be arrayed against each other in our court of dernier resort. Would there not be danger of thus changing our highest courts of justice into an arena of political discord and confusion?

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**Curia*, per WOODWORTH, J. This was an action for tre-

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ver to recover the amount of a promissory note drawn by Luther Marsh in favor of the plaintiff for \$435, and alleged to have been converted by the defendant.

The plea avers, that after the closing of the polls at the election in 1826, and before the event was known, the plaintiff and Marsh made a bet upon the event of the election for governor, they being legal voters; that the note was deposited by Marsh with the defendant, as stakeholder, upon condition that if De Witt Clinton had been elected governor at the election, the note was to be delivered to the plaintiff; that afterwards, and before the event of the election was generally known, and before the official canvass of the election in the respective counties of the state, Marsh forbade the defendant to deliver over the note to the plaintiff, and demanded that it should be delivered to him, and that in pursuance of such demand, he re-delivered the note to Marsh. To this plea there is a demurrer.

From the plea, I infer that Marsh, before the demand of his note from the stakeholder, was well satisfied as to the result of the election. The averment is that it was not generally known. Want of knowledge in Marsh is not pretended. This, then, is not the case of a party, who, having made an illegal wager, and deposited the amount with the stakeholder, attempts to avail himself of a *locus penitentie*, (before the event is known, and before there are any reasonable grounds for forming an opinion of the result,) and claims his deposit. It is not necessary here to say whether such a claim could be enforced against the stakeholder, should he refuse to comply; neither is it necessary to give any opinion on the question whether Marsh could, in this case, have sustained an action against the stakeholder, had he refused to deliver up the note.

The question here is between the winner and the stakeholder. The event has taken place; and the stakeholder is entitled to defend himself on the same ground that might be taken by the losing party had the action been against him. Is a wager of this kind recoverable? It is conceded that some wagers form the proper ground of an action, although courts have generally expressed regret that the

law has so been settled in any case. There are wagers of a different class, which cannot be supported, and among that number may be reckoned such as are contrary to the principles of morality or sound policy. (*Jones v. Randall*, and *Da Costa v. Jones*, Cowper, 37, 729.)

The wager in this case falls within the latter description ; for, although it does not possess one prominent feature which distinguished the case of *Bunn v. Riker*, (4 John. 426,) (I allude to the fact that the bet was laid on the last day of the election, and one of the parties had not then voted,) yet enough remains which the principles of sound policy forbid the court to sanction.

The wager is, that De Witt Clinton had been elected governor. By the act regulating elections, (sess. 45, ch. 250,) it is declared, that all questions that may arise in the canvass, estimate or calculation of the votes given at any election, shall be decided by the opinion of the majority of persons composing the board, who shall determine conformably to the the certified copies returned by the clerks of counties, the person duly elected, and cause to be delivered a certificate of their determination.

If the question is afterwards to be litigated in a court of law, I apprehend the certificate would only be *prima facie* evidence, and that it would be competent to go into evidence to show that the canvass was not correct, or was illegal. Thus a jury may find that the governor declared to have been elected had not been duly elected ; but that another person is the legal governor, by a majority of votes. Such decision would not affect the exercise of the powers of governor by the person holding the certificate ; but its manifest tendency would be to excite discontents, and possibly disturbances among the people ; to alienate their attachment from an incumbent chosen by a minority, and withhold confidence so essentially necessary in a government resting on public opinion. We may suppose a case, where it is alleged that a certificate was obtained by bribery. The question being as to the validity of the election of the chief magistrate, evidence might be offered to prove the fact, and thus implicate third persons, not parties to

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the suit, who may or may not know that any such question is pending. We are, then, called on to decide, whether an idle wager, which might draw into discussion matters of great public interest, the direct tendency of which is to open the door of collision between different departments of the government, to impair public confidence, and agitate the community, without producing any salutary effect, ought not to be considered as against sound policy? [1]

[1] *Brush v. Keeler*, 5 Wen. 266. *Like v. Thompson*, 9 Barb. 315. *Morgan v. Groff*, 4 Barb. 525. 2 New York B. S. 4th ed. 72, § 8, 9, declare all wagers, bets or stakes, made to depend on any race, or upon any gaming, by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event, to be unlawful. And that all contracts for or on account of any money, or property, or thing in action so wagered, bet, or staked, shall be void. And that any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet herein prohibited, may sue for, and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or any other person in whose hands shall be deposited any such wager, stake or bet, or any part thereof, whether the same shall be paid over by such stakeholder or not, and whether any such wager be lost or not. See also *Lewis v. Miner*, 3 Denio, 103. *Buckman v. Pitcher*, 1 Comst. 392. In this last case the plaintiff recovered from the stakeholder, after the stakeholder had paid over the bet to the winner by the direction of the plaintiff; and the court further held, that an action to recover the same might be brought without a prior demand. But money, knowingly lent to be used in betting, cannot be recovered from the borrower. *Peck v. Briggs*, 3 Denio, 107. *Morgan v. Groff*, 5 *id.* 364. *Buckman v. Ryan*, 5 *id.* 340. *McKinnell v. Robinson*, 3 M. & W. 434. *Cannon v. Bryce*, 3 B. & Ald. 179. *Langton v. Hughes*, 1 M. & S. 693. *The Gas-Light and Coke Co. v. Turner*, 5 Bing. N. C. 666. *De Begnis v. Armistead*, 16 Bing. Rep. 107. But money paid on illegal contract may be recovered back while the contract is executory, but not if it is executed. *Morgan v. Groff*, 4 Barb. S. C. Rep. 524. *Like v. Thompson*, 9 Barb. 315.

In the first the plaintiff sent money to the defendant, with directions to bet it on the event of an election, with a particular person; instead of doing so, the defendant used the money in betting with another person, and lost it. The court therefore *held*, that the contract was not executed, and that the plaintiff could recover, although the defendant had paid the sum lent him, by the plaintiff, to the winners. For it is a general rule, that as long as money deposited with an agent for an illegal purpose is unemployed; or if the purpose be countermanded by the principal before its application, it is a debt which may be recovered from the agent by the principal, either at law or equity. *Taylor v. Lendie*, 9 East, 49. 13 Ves. 313. 2 Black. Com. 467. *Lenant v. Elliot*, 1 Bos. & Pul. 3. *Farmer v. Russell*, 2 *id.* 296. *Paley's Asseny, Dunlop*, ed. 62, § 8. *Morgan v. Groff*, *supra*.

I have no difficulty in answering this question in the affirmative.

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In the case of *Briggs v. Peck*, one Smith Tompkins and Peck, borrowed money from Briggs, to bet on an election with Peck, which sum was deposited in the hands of Briggs the lender, as stakeholder. Tompkins lost the bet, and Briggs paid the money to Peck, who agreed to refund it in case Tompkins, the borrower, would not repay Briggs, and also to indemnify Briggs in case he sued Tompkins for the loan and could not recover. Tompkins refused to pay, and Briggs sued him, and failed: whereupon he sued Peck for the amount of the stakes, together with the costs of the former suit, and recovered. Bronson, Ch. J., said, "It will be proper to notice the rights of the parties as they stood before the money was paid over. And in the first place, although the defendant had won the wager, he had no legal title to the money. If paid to him it might be recovered back. The plaintiff could not recover from Tompkins the money, as it was loaned for an unlawful purpose. But Tompkins could not recover the money from them, because he had not in fact paid it. The plaintiff therefore was safe. The amount they borrowed from Briggs was in his hands as stakeholder, and no one could recover it from him. In this state of things, Peck applied for, and received the money, on the promise to refund it in case Tompkins should not approve the payment. And when Tompkins refused to ratify the payment, the defendant requested the plaintiff to sue Tompkins for the sum he had borrowed, and promised to repay the money in case the suit failed; and also to indemnify the plaintiff against the costs and expenses of the litigation. The promise was based on a sufficient consideration. This promise to refund the money, did not contravene either the letter or spirit of the gaming act." *Peck v. Briggs*, 3 Denio, 107, 109. "It is well here to observe that the laws of maintenance, beyond a prohibition against taking a conveyance of land in suit, buying and selling pretended titles, and conspiracies falsely to move or maintain suits, are abolished in this state by statute." *id.*

Although the losing party may recover back a wager after the event is known, either from the winner or stakeholder, yet where the stake was a chattel, which the loser retained in his possession, and when the event was determined against him, purchased it of the winner and paid him for it in money, and then sued him for it in trover, treating the sale as a conversion by the defendant, *held* that he could not recover.

Quere. If the suit had been for money paid on a purchase, could it be maintained? *Lewis v. Miner*, 3 Denio, 103.

A plaintiff seeking to recover a bet, should declare under the statute. See *Like v. Thompson*, 9 Barb. 313.

So under § 10 of the Constitution of the State of New York, and § 22 E. S. "raffling and lotteries are illegal," although works of art, which are to be distributed by chance, to any person who, before distribution, shall have paid his money for the chance of obtaining such distribution. *The People v. The American Art Union*, 13 Barb. 577.

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The defendant is entitled to judgment on the demurrer.

Judgment for the defendant (a.)

(a) In *M'Allister v. Hoffman*, (16 Serg. & Rawle's R. 147,) it was decided that money bet upon an election, and deposited with a stakeholder, who after the event of the election is known, has notice not to pay it over to the winner, but disobeys the notice, may be recovered back from the winner. It seems, by that case, that there is a statute of Pennsylvania, forbidding wagers on elections, under a penalty.

We are indebted for the following remarks on the validity of wagers generally, and bets on the event of an election particularly, and the decision of the supreme judicial court of Rhode Island on the latter subject, to the "United States Law Intelligencer, and Review," for Feb. 1829, a monthly publication of sterling worth, conducted by Mr. Joseph K. Angell, (Providence, R. I.) well known as the author of several volumes on some interesting branches of our law. This periodical throughout will richly compensate any lawyer for the expense and labor of procuring and studying it; and I feel myself justified in my extract, were it only with a view to bring before the profession and urge upon their attention the strong moral objections which it enforces against a disgraceful species of gambling. I feel no doubt that the bar of New York will fully concur with Mr. Angell on this head: and they will permit me to say, it depends much on them, whether we shall be favored (like the state of Pennsylvania) by a penal statute calculated to do away the greatest mischief which can befall the elective franchise. On this question, I refer them also, particularly, to the reasoning of C. J. Eddy, given in Mr. Angell's article, and that of President Rush, which I subjoin to the article quoted.

VALIDITY OF WAGERS AND BETS ON THE EVENT OF AN ELECTION.

The cases which have been adjudged in England in relation to bets or wagers do not, it seems, in general, prohibit this species of contract; and if a wager is made on indifferent subjects or questions (however trivial) it has been considered valid, and that an action thereon may be maintained against the loser. This was established in *Good v. Elliott*, (3 T. R. 693,) where the subject of the wager was, whether one S. T. had, or had not, before a certain day *bought a wagon belonging to D. C.; which wager three judges, contrary to the opinion of BULLER J., held to be good. So it has been held in *England*, that a wager on the ages of plaintiff and defendant is legal. (3 Campb. 168.) The courts, however, both in England and in this country, have frequently reprehended these contracts, and expressed their regret that they have ever been sanctioned. And it has been expressly decided in England that a wager made upon the life of Bonaparte, was void. (*Gilbert v. Sikes*, 16 East. 156.) And as late as the third ult., a wager on the escape of the same individual from St. Helena was adjudged void by the supreme court of Pennsylv-

vanla, though two of the judges dissented. The wager upon which the action was brought was evidenced by a writing in the following terms, which was signed by the parties: "May 14th, 1821. This day Stephen Ives bet one hundred dollars, with John Phillips, that Napoleon Bonaparte will, at or before the expiration of two years from the above date, be removed or escape from the island of St. Helena. It is understood between the parties, that if Bonaparte should die within the above period of two years, and on the island of St. Helena, that Mr. Ives loses the bet."

Bonaparte did die on the island of St. Helena, within the two years, or was dead at the time. The following is the opinion of the court:

"Certainly a wager can generally be recovered in England, unless when betting on the particular subject is prohibited by act of Parliament. When we reflect that no good can result to the community from the practice of betting, that much loss and domestic distress is occasioned by it, no wonder that in that country, judges have regretted that it has been decided that a bet could be recovered. When our ancestors separated this country from England, on the 28th January, 1777, it was enacted that the common law of such of the statutes of England as have heretofore been in force in this province, shall be in force and binding until altered, &c. Now I have always believed that the restrictive words "as have heretofore been" are applicable to common law as to statute law. Much of both never was, and is not now, law here. And I would imitate those judges who decided that gaming policies of insurance, though good at common law, were void here, and not suitable to the principles or genius of our institutions. In fact this is a gaming policy, but as I view this case, there is another principle on which the judgment of the court is right, admitting that some wagers can be recovered. But in this I do not give the opinion of the court, who think the legislature only can prohibit a recovery in all cases of wagers. No man or men have any right to occasion trouble or uneasiness to any other man or woman, and no court ought to assist them in so doing, or permit its jurisdiction to be abused, for such purpose. It has been decided that certain wagers, whether a particular person was a man or a woman, were not recoverable in a court of justice, because the proof might be indecent, and the investigation distressing to the person, although the testimony may not, in all cases, lead to inquiries or call for proof which is indecent, and although the investigation may, in some possible cases, not occasion distress to the person who is the subject of the bet. Yet the very same bet, and the evidence to be adduced, may be very distressing to another person, about whom the second bet may be made. A man of undoubted wealth, not in debt, and not surety for any person, may feel perfectly indifferent as to an investigation in a court of justice as to the precise amount of that wealth; but a man in other circumstances may be much distressed and seriously injured. I may be perfectly indifferent as to a bet on my age, but there are no doubt many persons about whose age it would be impertinent to bet, and who would be much hurt by the investigation. Ordinarily, a man in prison for any cause is enough distressed. Shall it be permitted, that the question, when he will be liberated, shall be a subject of wagers among idle, or thoughtless, or malicious persons? And shall the courts of justice of the country add to that distress, by listening to, and

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collecting others to listen to, all that malice or avarice may be able to collect on the subject? I would consider it as a case calling for a general rule, and say, that as every bet about the age, or height, or weight, or wealth, or circumstances and situation of any person are either malicious or indecent, or impertinent or indelicate, all such bets are illegal, and that no court ought, in any case, to sustain a suit on such a wager: and this, whether the subject of the bet was man, or woman, or child, married or single, native or foreign, in this country or abroad. I can perceive no principle of law or justice, which will require or permit the time of the country and its courts to be wasted, to gratify the malice or curiosity, or the caprice of the unthinking and impertinent. There are many things which politeness would not mention, and charity would conceal, and would not assist folly or malignity in making them public. I would not as a man, and I will not as a judge. I hold no bet of any kind, about any human being, recoverable in a court of justice. And as the majority of the court is of this opinion, it is unnecessary to notice the other points discussed."

It would certainly be gratifying if the courts of this country could consistently establish the doctrine with regard to wagers which prevails in Scotland, which is, that all wagers are invalid, on the sound principle, that courts of law were instituted solely for the protection of *real* rights, and for the enforcement of *serious* contracts. One rule, however, is well settled both here and in England, and that is, if a wager is contrary to public *morals** or *policy*, it is void. Whether this rule extends to a wager made on the event of an *election*, has, it appears in several cases, been a question for the court to determine. In the case of *Allen v. Hearn*, (1 T. R. 56,) which was an action of assumpsit before Lord Mansfield, to recover one hundred pounds on a wager made between the plaintiff and defendant, who were both voters, on the event of an election of a member to serve in Parliament; his lordship was of opinion, that the right of the plaintiff to recover, depended upon the question as to the nature and species of the contract; and that if the contract was in the eye of the law corrupt, it could not be supported. One of the principal foundations of the constitution, he reasoned, depended on the proper exercise of the elective franchise, that the election of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote. The wager, he thought, laid both parties under a *pecuniary influence*, and made each of them in the nature of a candidate. And he inquired, what was so easy, in a case where a bribe is intended, as to lay a wager? and remarked upon the difficulty of proving that a wager made a party give a contrary vote to what he would have done otherwise. As the wager, he continued to reason, had an influence on the mind of the party, it was a color for bribery, and hence was void.

*In the above case, it will be observed, the parties who made the wager, were both voters, and it seems to have been on that ground that the contract was adjudged void. But it is certainly very desirable under a government like ours, where elections are so frequent, to prevent as far as possible every

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*In an action very recently brought on a wrestling bet before the King's Bench, Lord Tenterden said, it was an action he could not try.

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species of undue influence, and to discountenance all electioneering for private ends. All wagers, therefore, made upon the event of an election, without any exception, should, when considered in reference to their results, in a political and moral point of view, unquestionably be denounced. In a case which recently came before the supreme judicial court of Rhode Island, the action was to recover the amount of a wager made between plaintiff and defendant—that the Hon. Asher Robins would be elected a senator to congress at the next ensuing senatorial election, at which the choice was to be made by the legislature. Both plaintiff and defendant were inhabitants and citizens of the state, but neither of them members of the legislature. Mr. C. J. Eddy, gave his opinion as follows :

"It is admitted that, by the common law, some wagers are legal, and may be enforced in a court of justice. This admission is made with regret in many of the modern decisions; and were the question *res integra*, there is little doubt that all wagers would now be declared illegal. Among wagers deemed illegal, are those against sound policy, or of immoral tendency, which may affect the feelings, interest or character of a third party, or tend to disturb the peace of society.

"In the case, of Gilbert and Silks, (16 East, 158,) an action on a wager on the life of Bonaparte, Lord Ellenborough says :—'Wherever the tolerating any species of contract, has a *tendency* to produce a public mischief or inconvenience, such a contract has been held void.' And after, in nearly the same words, 'if a contract have a *tendency* to a mischievous and pernicious consequence, it is void.' And again, 'where the subject matter of the wager has a tendency injurious to the interests of mankind, I have no doubt in saying that it ought not to be sustained.' In the same case, Le Blanc, J. says, 'It has often been lamented, that actions upon idle wagers should ever have been maintained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times.' 'And it is now clearly settled, that the subject matter of a wager must at least be perfectly innocent in itself, and must not tend to immorality or impolicy.' In the same case, Baily, J. speaking of the wager then under consideration, says. 'It gives to one person a *pecuniary interest* in the violent death of another, by whatever means procured.' 'Shall it be allowed to a subject to say, (says Lord Ellenborough in the same case) that the moral duties which bind man to man are in no hazard of being neglected when put in competition with individual interest ?'

"If we apply these principles to the question before us, there can be little doubt what the decision ought to be. The wager was on the election of a certain person, by the general assembly, to the office of Senator in congress. Did it not give to the plaintiff a *pecuniary interest* in the election of that person; and to the defendant an equal pecuniary interest in preventing that election? And shall it be allowed to either party, or any one else to say, that in this case the moral duties which bind man to man, or to communities of men, were in no hazard of being neglected, when thus put in competition with individual interest ?'

*"If a contract have a tendency to a mischievous consequence, it is void. What is the tendency of a wager, on an approaching election? Is it to pro-

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duce peace, harmony, fair dealing? Or is it not rather to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain, and corruption; of the use of *means*, by each party, fitted to the *end*, that is, the winning of the bet? And is not this tendency greater, in proportion to the amount of the wager, and the influence of the parties to the wager? To say that because the parties to a wager are not members of the legislature by whose vote the wager will be decided, therefore the wager can have no influence on the members of the legislature, is to say, that the power and influence of individuals out of the legislature, can in no case affect the vote of that legislature, however great the power and influence of those individuals may be; which is to say what is in itself absurd, what daily experience teaches to be false, and what a moment's reflection must convince every one is not and cannot be true. If the tendency of the wager, in the case before us, be thus, then is that tendency immoral; for no one, it is believed, will so far hazard his own reputation for correct moral feeling, as to undertake to reconcile misrepresentation, slander, intrigue, or corruption, with the principles of morality. We might then safely say, it is contrary to sound policy, because immoral. But it is contrary to sound policy in a more important point of view. More important, because the immoral tendency, and pernicious bearing on our free institutions, is more extensive and injurious. The stronghold of freedom in our country is in the freedom of our elections. Destroy this, and our freedom is at an end. Whatever tends to this destruction in the remotest degree, ought to be resisted here, with a determination that admits of no compromise. Wagers on elections, whether by the people or the general assembly, have this tendency directly. And this tendency, in a given case, is in proportion to the interest at stake, and the influence of the parties to the wager. To say that a wager can have no influence in such a case, is to say, either that man has ceased to regard his own interest, or that interest has ceased to influence man's conduct. This interest and influence may result in the grossest corruption. It is enough for the decision of this case to show, that a wager on an election has this tendency. Can it be necessary to ask, whether, in a free country, a contract which has a tendency to destroy freedom of elections, and produce corruption, is consistent with sound policy? In *Vischer v. Yates*, (11 John. 31,) which was an action against a stakeholder of a bet on an election, *KENT*, C. J., in delivering the opinion of the court says: 'We choose rather to place the decision of this case upon those great and solid principles of policy which forbid this species of gambling, as tending to debase the character, and to impair the value of the right of suffrage.'

"There is one other point of view in which this case may be considered, and in which this wager will appear equally indefensible. If the feelings, interest, or character of a third party may be affected by a wager; or if it tend to disturb the peace of society, it cannot be sustained. (*Da Costa v. Jones*, Cowp. 729.) If the election in question had taken place by a majority of one vote, and that one vote had been procured by bribery, would the wager have been fairly won? And if not won, ought not the defendant to be permitted to show it, and avoid the payment? But would a court of law inquire into a transaction, so full of interest and feeling to third parties,

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"in order to decide an 'idle wager?' No; nor would it comport with sound policy to suffer such a question to be discussed in a court of law, on a mere wager, dependent on the feelings or interest of third parties. In the case of *Da Costa v. Jones*, Lord Mansfield, stating as a case, a wager that an unmarried woman has had a bastard, says, 'Would you try that? Would it be endured? Most unquestionably it would not; because it is not only an injury to the third person, but it disturbs the peace of society; and the party to be affected by it would have a right to say, how dare you bring my name in question?' With how much more propriety might the parties charged with corruption in the case above supposed, put the same question! And how much greater would be the tendency in that case to disturb the peace of society!

"In the case of *Bunn v. Riker*, (4 John. 428,) which was a wager on the election of the governor of the state, Van Ness, J. says, 'It may involve an inquiry into the validity of the election of the present chief magistrate.' In answer to the objection that the certificate of the canvassers would be conclusive, he says, 'It is enough that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy. It is a discussion calculated to endanger the peace and tranquillity of a community.' These principles are fully recognized in the case of *Lansing v. Lansing*, (8 John. 454,) which was a similar bet, made after the polls were closed. Say the court, 'This case falls within the principle laid down in *Bunn v. Riker*, that a bet, involving an inquiry into the validity of the election of governor, was void, on principles of policy.'

"With these principles, as well as those quoted from the other authorities, whether binding on this court as authorities or not, we fully concur, and have no hesitation in saying, that all bets on elections, whether by the people or the general assembly, and all bets on judicial decisions, are of immoral tendency, against sound policy, and ought not to be sustained, especially in this state, where all our officers, judicial as well as others, are of annual appointment."

The following is the opinion of President RUSH, in the cause referred to by Mr. J. A. Spencer, *arguendo*, in the principal case:

RUSH, President. This is a wager on the election of a chief magistrate, and if ever a wager deserved reprobation, it is one of this description. In the state of New York, it has been decided, after argument, that a wager of this kind, whether laid before or after an election, cannot be recovered. Without adopting all the reasoning of the court in those cases, we have no hesitation in saying we concur in both decisions.

Even in England they have guarded their elections from this new species of corruption, and have vacated all such contracts as are contrary to sound policy.

Popular suffrage is the very essence of freedom, and cannot be protected by tribunals of justice with too much vigilance and firmness. Those external impressions that have a tendency to disturb its orderly and regular motions should be discountenanced, as repugnant to the vital interest of our

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country. To the usual motives that actuate voters, it would be monstrous to permit pecuniary considerations to be added.

*The success of an election might eventually become a matter of speculation and profit, like a horse race, rather than an acquisition to the freedom and happiness of the people. Where a man has actually voted, *prior* to his laying a wager on the election, he is not indifferent to the result. Though he himself cannot become a corrupt voter, he may be induced, under the influence of the wager, to corrupt others.

What were the motives of Smyth & M^rMasters, forms no part of the question. Is the contract injurious to the public welfare? In our opinion, it is equally repugnant to morality, to sound policy and to the laws of the state, passed for the avowed purpose of preserving the purity of our public elections.

It would be in vain to enact laws against bribery, and to authorize, at the same time, wagers of this kind, which, like a torrent of corruption, would carry all before them.

Even if the bet had been laid between two persons, who were not voters, which does not appear to have been the case, yet, as it might lead to a decision, by the judicial branch, on the validity of an election, and consequently, to the right of a member to a seat in the legislature, the point ought never to be brought into discussion. It is obvious that the legislative and judicial authorities might be put into a state of collision upon a question, which, it is apprehended, the legislature alone is competent to determine. Upon a case stated for the opinion of the court, they might give judgment, prior to the house of assembly deciding it, who might, perhaps, afterwards give a contrary decision. The most effectual way to avoid this is judicially to pronounce, as they have done in New York, all wagers upon the result of elections to be illegal and void.

The constitution of our state declares that elections shall be free. The body of the voter shall be equally free from constraint, and his mind from insuperable bias. A wager that a certain person will be elected, puts the mind as completely into trammels as a state of duress puts the body of the voter. The mind cannot act freely, as long as the man is held in bondage to his mercenary views and engagements; and, having divested himself of his own independence, he is a fit instrument of corruption to fasten the chains of slavery upon all around him.

It is the opinion of the court that the plaintiff cannot recover, and that judgment be entered for the defendant.

Judgment for the defendant.

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*JACKSON, *ex dem.* Witherell and Hyde, *against* JONES.

EJECTMENT brought to recover possession of a lot of land situate in the town of Hartford, in the county of Washington; tried at the Washington circuit, on the 16th day of June, 1826, before THROOP, C. Judge.

On the trial, the plaintiff gave in evidence the transcripts of two judgments, one in favor of Hyde, one of the lessors of the plaintiff, against Jonathan Morrison, rendered by Archibald Hay, Esq., one of the justices of the peace of the town of Hartford, on the 31st day of March, 1824, for \$35 66 damages and costs, which transcript was filed in the clerk's office of the county of Washington, on the 15th day of May, 1824. The other judgment was in favor of Witherell, the other lessor of the plaintiff, against the same Jonathan Morrison, for \$44 48 $\frac{1}{2}$, rendered by the same Archibald Hay, a justice, on the 30th of March, 1824; and the transcript thereof was filed in the office of the clerk of the county of Washington, on the 22d of June, 1824. *To these transcripts the defendant's counsel objected, as being insufficient; but the judge overruled the objection, to which the defendant's counsel excepted.*

The transcript of a justice's judgment, to be filed with and entered by the clerk of the county, pursuant to the 9th section of the statute, (sess. 41, ch. 94,) and the 20th section of the statute, (sess. 47, ch. 238,) need not show the proceedings before the justice, which respect the regularity of the judgment, or give jurisdiction.

The transcript being duly entered, is, *per se*, a lien on the lands of the judgment debtor; and proving the

transcript, filing and entry, is sufficient in deducing a title by sheriff's sale under a *f. fa.* The justice, or any other proof of the judgment before him, need not be produced.

If the recital of executions in a sheriff's deed of land describe them correctly in several particulars, but add others which are inaccurate, the latter may be rejected as surplusage. All that is necessary is, that the deed show that the sheriff acted under the authority of the executions, even admitting a recital to be important.

But the execution need not be set forth or recited in a sheriff's deed; and if recited and described inaccurately, the variance will not affect the deed.

In making out a title under a sheriff's deed, it appeared that the debtor in the execution was in possession several years before it issued, and before the judgment; and that the defendant in the ejectment held under him as tenant. Held, that the defendant was estopped to show title out of the debtor.

Where the plaintiff in ejectment made title under a purchase upon execution against the tenant of the judgment debtor, the tenant being defendant in ejectment, and showed by parol that the defendant confessed he held under the debtor by lease; and the defendant gave evidence that it was a written lease, and then objected that the plaintiff should produce the lease, or show notice to produce it: held, that the production of the lease lay with the defendant; and he omitting to produce it, or give legal proof of it, the lease should be taken to have expired, or not to be a subsisting lease so as to prevent the plaintiff's recovery.

Forms of all the documents necessary in the deduction of title to land under a justice's judgment, viz.: The transcript, execution and endorsements, sheriff's certificate of sale and sheriff's deed. Note (a) to this case.

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The plaintiff then gave in evidence an execution issued the 29th of June, 1824, on the judgment in favor of Hyde ; also *an execution issued on the judgment in favor of Withereil, on the 23d of June, 1824 ; to which executions the defendant's counsel objected, because they varied from the transcript of the judgments, and also because they were issued too soon. But the judge overruled the objection ; to which the defendant's counsel excepted. The plaintiff then gave in evidence the sheriff's certificate of sale of Jonathan Morrison's right and title to the lot of land in question, by virtue of the executions, on the 20th of September, 1824, to which the defendant's counsel objected as insufficient ; but the judge overruled the objection, and the defendant's counsel excepted. The plaintiff then gave in evidence a sheriff's deed of the premises in question, dated the 17th of January, 1826, to which the defendant's counsel objected on account of variance with the executions. The objection was overruled by the judge, and the defendant's counsel excepted. It was admitted by the defendant's counsel that the defendant was in possession of the premises in question at the commencement of the suit.

Jonathan Wood was then called as a witness on the part of the plaintiff, and testified that the defendant was in possession of the premises in question last fall. The witness knew the lot well. Jones, the defendant, claimed to hold under Jonathan Morrison, who was in possession of the lot for several years previous to 1824. Jones told the witness he held under Jonathan Morrison by lease. The witness had heard Zina Morrison, about the time the defendant went into possession, frequently, when speaking of the lot, call it Jonathan's. Farther testimony as to the interest of Jonathan Morrison is stated in the opinion of the court.

Here the plaintiff rested.

The defendant moved for a nonsuit, on the grounds, 1. That the lease from Jonathan Morrison, the defendant, was not produced ; 2. Because the plaintiff had not proved that Jonathan Morrison had any title to the premises in question, and he was not in possession at the time when the judgments were rendered, or at the time of the sheriff's sale.

The motion was denied, and the defendant's counsel excepted.

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*The defendant then gave evidence to show a title out of Jonathan and in Zina Morrison; but as this branch of the case was not considered by the court, it is not stated here. (a)

Verdict for the plaintiff.

A motion was now made, in behalf of the defendant, for a new trial.

(c) The various documents in evidence were annexed to the case, and were as follows:

TRANSCRIPTS.

WASHINGTON COUNTY, ss.

Harlo C. Witherell	}	At a court holden before me, Archibald Hay, one of the justices of the peace of the said county, at my office in the town of Hartford, in said county, on the 30th day of March, A. D. 1824, the above named plaintiff appeared in court. After hearing the proofs and allegations of him, the said plaintiff, in a plea of trespass on the case upon contract.
Jonathan Morrison.		

Damages,	\$43 33	} It is considered by the said court now here, that the said Harlo C. Witherell do recover against the said Jonathan Morrison forty-three dollars and thirty three cents, and his costs of suit, taxed at one dollar fifteen and a half cents.
Witness' fees,	12 1-2	
Constable Eldridge's fees,	12 1-2	
Justice's fees,	47	
Clerk's fees,	43 1-2	
	<u>44 48 1-2</u>	

Filed June 22, 1824.

A transcript,

ARCHIBALD HAY, Just. Peace.

Endorsed, "Filed June 22, 1824."

The other transcript was in the same form, *mutatis mutandis*, and was endorsed, "Filed May 15, 1824."

EXECUTIONS.

The people of the state of New-York, by the grace of God free and independent; to the sheriff of the county of Washington: Greeting.

Whereas Harlo C. Witherell, on the thirtieth day of March, one thousand eight hundred and twenty-four, before Archibald Hay, Esq., one of the justices of the peace, in and for our county of Washington, by the consideration of the said justice, recovered a certain judgment of forty-four dollars and forty-eight and a half cents against Jonathan Morrison, as by the transcript of the said judgment and certificate of the said justice remaining of record in the office of our clerk of the said county of Washington, filed the twenty-second day of June, 1824, more fully appears; and it appearing that execution remains to be had of and upon the said judgment; therefore we command you, that of the goods and chattels, lands and tenements of the said Jonathan Morrison, you levy the said sum of forty-four dollars and forty-eight and a

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*S. Stevens, for the defendant. 1. There was no proof of the judgments before the justice on which the premises were sold. (*McCarty v. Sherman*, 3 John. 429. *Reed v. Gilbert*, 12 id. 296.) The transcripts were not proof of the fact of the rendition of the judgments. (*Lawa*, seas. of 1818, p. 80.)

half cents, and make sale thereof according to law. And if goods and chattels, lands and tenements whereon to levy, sufficient to satisfy the same, cannot be found in your county within forty-five days from the date hereof, then we command you, that after the expiration of the said forty-five days, and not sooner, (unless after diligent search no goods or chattels, lands and tenements can be found whereon to levy,) you take the body of the said Jonathan Morrison and commit him to the goal of the said county, there to remain until discharged by due course of law; and do you make return of this writ and your proceedings hereon within ninety days from the date hereof. Witness Archibald Hay, Esquire, the said justice, at Hartford, in the said county, this twenty-third day of June, 1824.

M. D. DANVERS, Clerk.

ENDORSEMENTS.

JUSTICE'S COURT.

Harlo C. Withereil } Levy \$44 48 1-2, and interest from 30th March,
v. }
Jonathan Morrison. } 1824, besides your fees, &c.

M. D. DANVERS, Clerk.

Received 30th June, 1824.

JOHN GALE, Sheriff.

The other execution and endorsements were in the same form, *mutatis mutandis*.

THE SHERIFF'S CERTIFICATE OF SALE.

SHERIFF'S SALES.

By virtue of two executions issued by the clerk of the county of Washington, on judgments obtained before one of the justices of the peace for the said county, against the goods and chattels, lands and tenements of Jonathan Morrison, I have seized and taken all the right, title and interest of the said Jonathan to a certain piece or parcel of land, situate in the town of Hartford, and bounded as follows, viz.: on the north by Daniel Brown, east by Daniel Brown and lands supposed to belong to Joseph Cowan, south by John Smith and Joseph Bull, and west by Cornelius and Richard Riley being the same on which John B. Jones now resides, containing, by estimation, one hundred acres, be the same more or less, which I shall expose to sale at public auction or vendue, at the public house of Benjamin Hyde, in the town of Hartford, on the 20th day of September next, at 10 o'clock in the forenoon of that day. Dated 5th August, 1824.

JOHN GALE, Sheriff.

W. R. Huggins, Dep'y.

*2. The transcripts are insufficient, because they do not show that the justice before whom the judgments were rendered had jurisdiction. It does not appear, by the transcript of the judgment in favor of Witherell, that the defendant in that judgment was ever summoned or ever appeared in court. Under such circumstances, the justice had no

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I certify, that at the time and place mentioned in the annexed notice, I sold at public auction the premises described in said notice, to Harlo C. Witherell and Benjamin Hyde, for ninety-two dollars and twenty-eight cents, that being the highest sum bid for the same. Dated Hartford, 20th September, 1824.

JOHN GALE, Sheriff.

By W. B. Huggins, his Deputy.

Endorsed, "Filed Sept. 21, 1824."

SHERIFF'S DEED.

To all to whom these presents shall come, I, John Gale, late sheriff of the county of Washington, send greeting. Whereas by virtue of two executions issued by the clerk of the said county, on judgments obtained before one of the justices of the peace for the said county, tested the twenty-third day of June, one thousand eight hundred and twenty-four, to me directed and delivered, by which I was commanded, that of the goods and chattels of Jonathan Morrison, in my bailiwick, I should cause to be made forty-four dollars and forty-eight and an half cents, which Harlo C. Witherell, lately, in the said court, before the said justice, in the town of Hartford, in the county aforesaid, recovered against the said Jonathan Morrison, and also one other execution, tested the twenty-ninth day of June, one thousand eight hundred and twenty-four, and to me directed and delivered, by which I was commanded, that of the goods and chattels of Jonathan Morrison, in my bailiwick, I should cause to be made, thirty-five dollars and sixty-six cents, which Benjamin Hyde, lately in the said court, before the said justice, in the town of Hartford, in the county aforesaid, recovered against the said Jonathan Morrison, for their damages which they had sustained, as well by occasion of the not performing certain promises and undertakings then lately made, by the said Jonathan Morrison, as for their costs and charges by them about their said suits in that behalf expended; and if sufficient goods and chattels of the said Jonathan Morrison could not be found in my bailiwick, that then, and in that case, I should cause the damages aforesaid to be made of the lands and tenements whereof the said Jonathan Morrison was seized on the thirtieth day of March, one thousand eight hundred and twenty-four, or at any time thereafter; and whereas, after the coming to me of the said executions, and before the return day thereof, for want of sufficient goods and chattels in my bailiwick of the said Jonathan Morrison to satisfy the said damages, I did, by virtue of the said writs of execution, seize, take and advertise for sale, the right and title of the said Jonathan Morrison to a cer-

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jurisdiction of the cause. (*Martin v. Moss*, 6 John. Rep 126. *Bromaghin v. Thorp*, 15 John. 476.) It does not appear, by the transcript of Hyde's judgment, that the defendant in that judgment was summoned, or that the parties joined issue before the justice; one of which is necessary to give the justice jurisdiction. (1 R. L. 386.) Justices are confined strictly to the authority given them by the statute. (1 John. Cas. 20, 228. 1 John. Ch. Rep. 594, *note* (a). 19 John. 33. 6 Cowen, 234.) *

3. There was no evidence of the sale of the premises in

tain piece of land, situate in the town of Hartford, and bounded as follows, viz: On the north by Daniel Brown, east by Daniel Brown and lands supposed to belong to Joseph Cowan, south by John Smith and Joseph Bull, and west by Cornelius and Richard Riley, being the same on which John B. Jones now resides, containing one hundred acres, more or less; and on the twentieth day of September, one thousand eight hundred and twenty-four, I, then being such sheriff as aforesaid, sold the said lot or piece of land according to the form of the statute in such case made and provided, to Harlo C. Witherell and Benjamin Hyde, for ninety-two dollars and twenty-eight cents, that being the highest sum bid for the same. And whereas the said lot or piece of land has not been redeemed as is provided in and by the act of the legislature of the state of New York, entitled an act in addition to an act concerning judgments and executions, passed the twelfth day of March, 1820.

Now know ye, that I, John Gale, sheriff aforesaid, by virtue of the said writs of execution, and of the statute in such case made and provided, and in consideration of the said sum of ninety-two dollars and twenty eight cents to me in hand paid, by the said Harlo C. Witherell and Benjamin Hyde, the receipt whereof is hereby confessed and acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said Harlo C. Witherell and Benjamin Hyde, and to their heirs and assigns forever, the aforesaid described lot or piece of land with its appurtenances, and all the estate, right and title and interest which the said Jonathan Morrison had in the said lot or piece of land on the thirtieth day of March, one thousand eight hundred and twenty-four, or at any time thereafter; to have and to hold the said lot or piece of land, and every part thereof, with its appurtenances, unto the said Harlo C. Witherell and Benjamin Hyde, their heirs and assigns forever, as fully and as absolutely as I, the said John Gale, sheriff as aforesaid, and under the authority aforesaid, might, could, or ought to sell and convey the same. In witness whereof, I have hereunto set my hand and seal, this seventeenth day of January, one thousand eight hundred and twenty-six.

JOHN GALE, (L. S.)

This deed was acknowledged, and endorsed as recorded, in the usual form.

question, under or by virtue of these executions. The statute is peremptory, and requires the sheriff to describe the execution in his certificate of sale, so that the purchaser may know who is entitled to redeem; and he should also state when the purchaser is entitled to a deed. (Sess. Laws of 1820, p. 167.) The sheriff's certificate does not comply with the statute in these respects. Nor does the certificate show that the sale was by virtue of the executions issued on the judgments; and the sheriff's deed, given in evidence by the lessors, shows that the sale was upon different executions. Witherell's judgment was rendered on the 30th of March, 1824, and the transcript filed the 22d of June, 1824. The execution described in the sheriff's deed was on a judgment, the transcript of which would appear to be filed on the 30th of March, 1824, and commanded the sheriff to make the money off the lands of which the defendant in the judgment was seised on the 30th of March, 1824, or at any time afterwards. Hyde's judgment was rendered on the 31st of March, 1824, and the transcript filed the 15th of May, 1824. The execution described in the sheriff's deed is on a judgment, the transcript of which would appear to have been filed on the 30th of March, 1824, and commanded the sheriff to make the money off the lands of which the defendant was seised on the 30th of March, 1824, or at any time afterwards. Neither of the executions produced, had any such mandate. It necessarily follows, from these facts unexplained, that the executions by virtue of which the sheriff sold, were not the same produced in evidence.

Although a misrecital of the execution in the sheriff's deed would not be material, yet in this case it does not appear there was any misrecital. It is to be presumed that the sheriff has correctly recited the execution under which he sold, in his deed. The plaintiff ought to have introduced the sheriff as a witness, and proved that the deed was in fact given by virtue of the sale upon the executions, if such was the fact. (*Jackson v. Streeter*, 5 Cowen's Rep. 529.)

4. The plaintiffs in the judgments being the purchasers, they are chargeable with notice of every irregularity at-

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tending the judgments, executions and sale. (*Sims v. Catlin*, 2 Caines' Rep. 61.)

5. The plaintiff ought to have been nonsuited on the trial, because he proved no title in Jonathan Morrison, the defendant in the judgments; he not being in possession of the premises, either at the time of the rendition of the judgments, or the time of the sale; (2 Phil. Ev. 204, 5; 1 Yeates' Rep. 21; 4 Cowen's Rep. 601;) and because he did not legally prove that the defendant here came into possession under the defendant in the executions. The lease was the highest evidence of that fact, and ought to have been produced, or notice given to the defendant to produce it. If the defendant did hold under Jonathan Morrison, (the defendant in the executions,) the plaintiff did not show that his (the defendant's) term had expired, which could only be done by producing the lease, or by giving notice to the defendant to produce it, and then, on the non-production of it, proving its contents. (*Adams on Eject.* 202.)

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D. Russell, contra. The previous uninterrupted possession of the lot in question, by Jonathan Morrison, is evidence of title in him. He too is the common source of title in this case. (2 John. Rep. 22. 3 id. 288. 4 id. 202. 10 id. 338. 11 id. 504.) The defendant entered under Jonathan Morrison, whose right has, by operation of law, passed to the lessors of the plaintiff. The defendant, then, was the lessor's tenant; and he can set up no right hostile to that under which he entered. The possession must be restored, and then Zina Morrison can resort to his action, if he wishes to put in issue the validity of his deed. (1 Caines, 444. 2 John. Rep. 45, in note: 3 id. 188, 222, 499. 6 id. 34. 7 id. 157, 188. 10 id. 288.)

As to the proof of the judgments. By the statute, (sess. 41, ch. 94, § 9,) the clerk is to file the transcript and enter the judgment, which, when done, is to be a lien to all intents and purposes as a common pleas judgment. If it is to have the same effect, all you need do is, to give the transcript in evidence. This proves every thing necessary to establish

the lien. It is not necessary on proving a C. P. judgment to go back and show the beginning or intermediate proceedings. The statute, (sess. 47, ch. 238, § 20,) contains the same provisions.

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As to the variance, it was not so material as to make it at all questionable that the executions recited in the deed are the same which were given in evidence at the trial. (10 John. 381.) Beside, the defendant is a stranger to the proceedings, and cannot object their irregularity. (18 John. 97.) The executions were not issued prematurely. The recital of the executions is mere surplusage, and may be rejected.

* This leaves the deed to its full operation under such executions as in fact existed without regard to any recital. All variance may be amended, and should be received as if this had been actually done. The sheriff's deed alone was sufficient evidence of a sale, without the certificate. That is surplusage, and may also be put out of the case. The rights of the immediate parties to the sale are the same, whether any certificate be given or not.

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Curia, per SUTHERLAND, J. The lessors of the plaintiff claimed a right to recover the premises in question, as purchasers at a sheriff's sale, under two judgments against one Jonathan Morrison. One of the judgments was in favor of Witherell, and the other of Hyde; and they became joint purchasers of the premises in question upon the sale.

The judgments were originally obtained before a justice of the peace, and the transcripts were certified and filed in the county clerk's office; and the judgments were entered therein, and the executions were issued, in pursuance of the provisions of the 9th and 10th sections of the act to extend the jurisdiction of justices of the peace, passed the 10th of April, 1818. The plaintiff produced a certified copy of the transcripts from the county clerk's office, as evidence of the judgments. They were objected to as insufficient; but the objection was overruled by the judge. The grounds of the objection to the transcripts do not appear to have been specified upon the trial.

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It is now, however, contended, 1. That the transcripts were not proof of the fact of the rendition of the judgments; that the magistrate before whom the judgments were obtained, and who gave the certificates or transcripts, should have been called to prove them: and 2. That, admitting the transcripts to be competent evidence in themselves, yet they were insufficient in this case, because they did not show that the justice before whom the judgments were rendered had jurisdiction; it not appearing, in either case, that the defendant was summoned or ever appeared in court.

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The 9th section of the act already referred to, makes it the duty of the county clerk to file the justice's transcript of the judgment, and bond; and enter the judgment in a book, to be by him kept for that purpose, together with the time of his receiving the same; and declares that *any judgment* so entered by the said clerk, shall, from and after the time of *his receiving it as aforesaid*, be a lien on real estate, to all intents and purposes, as if the said judgment had been rendered in the court of common pleas of the county where such judgment shall be given. [1]

I am inclined to think it was the intention of the legislature to put these judgments upon the footing of judgments in the common pleas, in all respects. They are, by the express terms of the act, *to be a lien on real estate*, in the same manner; and the transcript, when received and filed, is to be considered the evidence of the judgment, and to be proved in the same manner as other documents or papers of the same character on the files of the office. I do not understand the objection to have been, that the transcripts produced on the trial were not properly proved to

[1] § 63 of the New York code, substantially reenacts the above provision, and also provides, that a certified transcript of the judgment may be filed and docketed in the clerk's office of any other county, and with the like effects, in every respect, as in the county where the judgment was rendered; except that it shall be a lien only from the time of filing and docketing the transcript. The judgment acquires no additional validity from being transcribed and docketed, except that it becomes a lien on the real estate of the judgment debtor. *Young v. Remer*, 4 Barb. S. C. Rep. 442. See, also, *Johnson v. Burrill*, 2 Hill, 238.

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have been copies of the transcripts on file; but that neither were competent evidence of the judgments, unless authenticated by the oath of the justice. The legislature, by directing the clerk of the court of common pleas to enter the judgments upon the filing of the transcript, seem to have decided that transcript, without the oath of the justice, is sufficient evidence of the judgments before him. If the transcript were to be verified by the oath of the justice, it should be before, or at the time when it is filed, and made the evidence or foundation of a judgment, upon which the clerk of the court is authorized to issue an execution. The transcript is *prima facie* evidence of the judgment. [1]

As to the second point, the judgments themselves are not directly in issue. The defendant is a stranger to them. They are drawn in question collaterally. They are, as between these parties, to be considered as judgments of the common pleas, and as valid and regular until impeached.

The sheriff's deed describes the executions under which the sale was made, in a manner which leaves no doubt that they were the same executions produced and proved in the cause. The parties are the same, as also the test, and the amount directed to be levied. Sufficient appears to show that those executions were the authority under which the sheriff acted, and that is all that is necessary. The execution need not be set forth or recited in the deed, and if recited and described inaccurately, the variance will not affect the deed.[2] (10 John. 381. 18 id. 7. 2 Phil. Ev. 204, 5, note (a) 5 Cowen, 530.)

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[1] Jackson v. Tuttle, post 233. The transcript may be proved by exemplification, or as other records of the Common Pleas. Tuttle v. Jackson, 6 Wen. 213. S. C. 9 Cow. 233, 238. It need not be authenticated by the oath of the justice nor proof of his official character. Tuttle v. Jackson, 6 Wen. 221, 122. Nor show on its face that the justice had jurisdiction; id. S. C. post, 223, and a very imperfect transcript, written in bad English, if intelligible in its essential respects will answer. Jackson v. Browner, 7 Wen. 388. But a transcript cannot be used as evidence of the judgment for the purpose of establishing a former recovery, or any purpose except that contemplated by statute. O'Connel v. Seybert, 13 Sergt. & R. 54, 57.

[2] Per Chancellor in Jackson v. Roberts' executors, 11 Wen. 422, 428.

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The title or interest of Morrison, (the defendant in the judgments and executions,) in the premises in question, was sufficiently shown *prima facie*.

Jonathan Wood testified, that Jonathan Morrison was in possession of the premises in question, for several years previous to the year 1824; that the defendant, Jones, was in possession at the commencement of this suit; that he claimed to hold under Jonathan Morrison; and he told the witness that he held under Jonathan Morrison by lease. Thomas Jones, a witness on the part of *the defendant*, testified that the defendant, his father, went into possession of the premises under Jonathan Morrison, in the *fall* of 1823. The lease was executed on the 4th of November, 1823. All the evidence in the case shows that Jonathan Morrison was the *reputed* owner of the lot in question.

The defendant, at all events, is estopped from denying the title of Jonathan Morrison as landlord. His possession was derived from Morrison. He has acknowledged the general interest or title of the lot to be in him; and if the defendant has a subsisting right to the possession under his lease, it was his business to show it by producing the lease. Independent of the lease, he is not at liberty to deny the title of his landlord; The lessors stand in the place of Jonathan Morrison. His rights have passed to them by operation of law. (2 Phil. Ev. 204. Jackson v. Town, 4 Cow. 601; and vid. 5 Cowen, 129. 7 Cowen, 325. 2 T. R. 53. 1 T. R. 760. 1 Caines, 444. 2 John. Cas. 223, 499. 6 John. Rep. 34. 7 id. 157, 186. 10 id. 258.)

It is contended, that the plaintiff should have produced the lease, or given notice to the defendant to produce it; that the lease was the highest evidence of the fact that the defendant *came* into possession under Morrison. But the fact of his having gone into possession under a written lease, came out from the defendant's witness. His confession, as proved by the plaintiff, was, that he held under Jonathan Morrison by lease. But whether it was a parol or written lease, did not appear until disclosed on the part of the defendant. He was the tenant to whom the lease was given; had it in his possession; and if he had any

existing rights under it, it was his business to produce it.

In this view of the case, all the evidence in relation to the title of Zina Morrison was irrelevant. The defendant was precluded from setting up a title in a third person.

The motion for a new trial must be denied.

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New trial denied.

*WOOD against THE PRESIDENT, DIRECTORS AND COMPANY
OF THE JEFFERSON COUNTY BANK.

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ON error from the Jefferson C. P. In the court below the bank declared against Wood, as endorser of a note,

The omission to assign a breach to one of several counts in assumption.

umpait, is aided by the verdict; and may be amended. Where a statute requires that a certain affidavit shall be made without saying before whom, (e. g. the 1st sect. of the stat. sess. 39, ch. 231, providing for incorporating the Jefferson Co. Bank,) it may be taken before any magistrate or officer having power to administer an oath.

The requisites to give the Jefferson County Bank existence as a corporation according to the statute, (sess. 39, ch. 231,) pleaded and set forth particularly in reply to a plea of *nil tiel corporation*, put in at the suit of the bank, and issues taken upon those several requisites in a rejoinder.

Though a party, in pleading matters which constitute his right, (e. g. the organization of a bank under its charter,) set forth more matters than are necessary, upon which, with those that are necessary, issue is joined, yet he need prove those matters alone which are necessary.

Thus, where a bank having sued on a note, replied to a plea of *nil tiel corporation*, (instead of demurring as it might,) setting forth all the steps made necessary by the act, (sess. 39, ch. 231,) to give it existence as a corporation, with divers others; upon all which matters issued was joined; yet held, that at the trial, it need prove no more than would be necessary upon the general issue.

The plea of *nil tiel corporation* is bad on special demurrer.

Upon the general issue, or *nil tiel corporation*, pleaded in an action by The Jefferson County Bank, incorporated by the statute, (sess. 39, ch. 231,) it is not sufficient for the bank merely to produce the act of incorporation; but certain steps were required by the statute to be taken before the corporation had existence; e. g. opening books, subscription and distribution of stock, the choice of directors, and by them a president and cashier, &c. Not producing the books showing the election of the officers, and the affidavit required by the first section of that act, are, *prima facie*, sufficient to prove that all the previous steps required by the statutes were taken. [1]

A holder of a promissory note giving time to the maker, to the prejudice of the endorser, discharges the latter.

An agreement with the maker to prosecute the endorser, and if the debt cannot be collected, then to receive security from the maker at two years, does not suspend the right to sue the maker at any time before the suit against, and failure to collect of the endorser.

Whether a cashier of a bank holding a note, has power to make an agreement to suspend the payment of the note without the consent of the directors? *Quere*.

[1] See 2 Cowen & Hill's notes to Phil. Ev. 263. *Commonwealth v. Woolper*, 3 Sergt & B. 29. *Grays v. Tump. Co.* 4 Rem. 578. *The State v. Buchanan*, 1 Wright, 232.

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dated May 14th, 1825, made by one Heath for \$150, adding the common count for monies, &c. The breach or refusal to pay, in the conclusion of the declaration, referred to the count on the note only.

The defendant below pleaded, 1. Non assumpsit ; 2. "That the plaintiffs are not of a body politic and corporate, and have no right to sue the said defendant ; and this he is ready to verify, wherefore, &c."

To the second plea, the plaintiffs replied as follows :

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That before the commencement of this suit, viz. on the 17th day of April, A. D. 1816, an act entitled "an act to incorporate the Jefferson County Bank," was passed by the legislature of the state of New York, by which, among other things it was enacted by the people of the state of New York, *represented in senate and assembly, that all such persons as should be stockholders of the Jefferson County Bank, should be, and were to be from time to time, and until the first day of January, A. D. 1732, a body politic and corporate, in fact and in name, by the name of The Jefferson County Bank ; and that, by that name they and their successors, until that day, might and should have succession, and should be in law, persons capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions: provided, however, and it was made one of the conditions of said act of incorporation, that the said bank should be established in the county of Jefferson, and that its operations of discount and deposit should be carried on in one of the villages of said county, and not elsewhere.

And it was also further provided and declared in and by the said act, that it should not be lawful for the said bank to issue any notes or bills, until an affidavit by the president and cashier of said bank should have been made and filed in the clerk's office of the county of Jefferson, stating that the sum of twelve and a half *per cent.* upon each share of the capital stock of said bank had been actually paid into said bank in specie, as by reference to said act will more fully and at large appear.

And it was also further enacted in and by the act above mentioned, that the capital sum of said bank should not exceed \$400,000 ; and that a share in said bank should be \$50, and that subscription books should be kept open under the direction of the following persons, as commissioners to apportion the stock and determine on a site for the banking house, viz. Elisha Camp, &c. (naming the commissioners,) until the whole of the stock of said corporation was subscribed for, and five *per cent.* on the amount of the same paid into the hands of the said commissioners.

And it was also further enacted, in and by the act aforesaid, that the commissioners above named, or a majority of them, should meet at the house of Isaac Lee, in the village of Watertown, and fix on a site for the banking house, (meaning for *the banking house for the said The Jefferson County Bank,) and make an equitable distribution of the stock of said corporation among the subscribers for the same, and receive from the said subscribers the sum of five *per cent.* on the amount of their said subscription, on the first Monday of June next after the passing of the said act, viz. on the first Monday of June, A. D. 1816, as by reference of the said act will more fully and at large appear.

And the said plaintiffs in fact say, that the said bank was established in the said county of Jefferson, and that the operations of said bank hitherto have been, and still are, carried on in one of the villages of said county of Jefferson, and not elsewhere. The said plaintiffs further in fact say, that the said bank, to wit, they the said plaintiffs, did not issue any notes or bills until an affidavit by the president and cashier of said bank was made and filed in the clerk's office of the county of Jefferson, stating that the sum of twelve and a half *per cent.* on each share of the capital stock of the said bank had been actually paid into the said bank in specie ; and that such an affidavit was made and filed as aforesaid, to wit in the clerk's office aforesaid, to wit on the first day of January, 1817. And the said plaintiffs further in fact say, that the said subscription books for the stock of said bank were kept open in the manner and

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form above prescribed by the said act, to wit, under the direction of the persons above mentioned, appointed commissioners to apportion the stock of the said bank or corporation, and to determine on the site for the banking house of said corporation, until the whole of the stock of the said corporation was subscribed for, and five per cent. on the amount of the said subscriptions paid into the hands of the said commissioners.

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And the said plaintiffs in fact say, that the said commissioners, or a majority of them, did meet at the house of Isaac Lee, in the village of Watertown, to wit, on the first Monday in June, A. D. 1816, and did then and there fix on a site for the said banking house, to wit, on a certain lot of land situate in the village of Adams, in said county of Jefferson; and that the said commissioners did then and there, to wit, at the house of Isaac Lee, in said village of Watertown, to wit, on the *first Monday in June, A. D. 1816, aforesaid, make an equitable distribution of the said stock of the said corporation among the subscribers for the same, and received from the said subscriptions 5 per cent. on the amount of their subscriptions.

And the said plaintiffs aver that thirteen directors of said bank were duly chosen, in manner and form prescribed in and by the said act, and that the enactments, requirements and provisions of the said act, and all and every and each of them have in all things been performed, fulfilled and complied with; and that they, the said plaintiffs, hitherto, to wit, since the first Monday in June, A. D. 1816, have been, and during all the time aforesaid were, and still are, a body politic and corporate, in fact and in name, by the name of the President, Directors and Company of the Jefferson County Bank; and that they the said plaintiffs have done, performed and fulfilled all things on their part to be done, performed and fulfilled in and by the said act.

And the said plaintiffs aver, that they the said plaintiffs are the same, The President Directors and Company of the Jefferson County Bank, mentioned in said act, entitled "An act to incorporate the Jefferson County Bank," and not other or different The President, Directors and Company

of the Jefferson County Bank: All which the said plaintiffs are ready to verify; wherefore, &c.

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To this the defendant rejoined as follows:

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"That no act entitled 'An act to incorporate the Jefferson County Bank' was ever passed by the legislature of the state of New York, enacting that all such persons as should be stockholders thereof should be, and were thereby ordained, constituted, and declared to be, from time to time, and until the first day of January, A. D. 1832, a body politic and corporate, in fact and in name, by the name of The President Directors and Company of the Jefferson County Bank; and that by that name they and their successors should be in law, persons capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions; nor was there any provision in that act of incorporation, that the said bank should be established in the county of Jefferson, and that its operations of discount and deposit should be carried on in one of the villages of said county, and not elsewhere; that it should not be lawful for the said bank to issue any notes or bills until an affidavit by the president and cashier of said bank should be made and filed in the clerk's office of said county of Jefferson, stating that the sum of twelve and a half per cent. upon each share of the capital stock of said bank had been actually paid into said bank in specie; nor was there any provision that the capital stock should not exceed \$400,000, and that a share in said bank should be \$50; that subscription books should be kept open under the directions of the commissioners, to apportion the stock, and determine a site for the banking house mentioned in said replication, until the whole of the stock of said corporation was subscribed for, and five per cent. on the amount of the same paid into the hands of the commissioners; nor was there any provisions enacting that the said commissioners, or a majority of them, should meet at the house of Isaac Lee, in the village of Watertown, and fix on a site for a banking house for the said Jefferson County Bank, and make an equitable distribution of the

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stock of said corporation among the subscribers, and receive the sum of five per cent. on the amount of their said subscriptions on the first Monday of June, 1816.

And the said defendant further saith, that the said bank was not established in the county of Jefferson, and that the operations of said bank hitherto have not been, and are not still carried on in one of the villages of said county of Jefferson.

And the said defendant further saith, that the said bank, to wit, the said plaintiffs, did issue notes and bills before an affidavit by the president and cashier of said bank was filed in the clerk's office of the county of Jefferson, stating that twelve and a half per cent. on each share of the capital stock of said bank had been actually paid into said bank in specie.

And the said defendant further saith, that no affidavit was ever made or filed by the president and cashier of said bank, in pursuance of the true intent and meaning of said act and *that no subscription books for said bank were ever kept open in the manner and form prescribed by the said act, until the whole of the stock of the said corporation was subscribed for.

And the said defendant further saith, that the said commissioners, or a majority of them, did not meet at the house of Isaac Lee, in the village of Watertown, on the first Monday of June, A.D. 1816, nor did they then and there on that day fix on a site for the said banking house on a certain piece of land in the town of Adams, in the county of Jefferson; nor did the said commissioners, on the first day of June A. D. 1816, aforesaid, make an equal distribution of the said stock of the said corporation among the subscribers, nor receive five per cent. on the amount of their subscriptions. And the said defendant further saith, that thirteen directors for said bank were not duly chosen in manner and form prescribed in and by said act, nor have the enactments, requirements and provisions of said act, nor any of them, in anything, been performed, fulfilled or complied with.

And the said defendant further saith, that the said plaintiffs have not hitherto, since the first Monday in June, A.D.

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1816, been and during the time aforesaid were not, and are not now, a body politic or corporate, in fact and in name, by the name of The President, Directors and Company of the Jefferson County Bank; nor have the said plaintiffs done, performed and fulfilled all things on their part and behalf to be done in and by said act.

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And the said defendant further saith, that the plaintiffs are not the same The President Directors and Company of the Jefferson County Bank mentioned in an act entitled "An act to incorporate the Jefferson County Bank," concluding to the country.

On the trial, (June, 1826,) the signature of the defendant on the note, the demand of payment, and notice of non-payment to the defendant, were duly proved.

The plaintiffs then produced and read in evidence the act of incorporation of 1816, by which they became a body politic and corporate, and also the certificate required by said act to be filed, of which the following is a copy, viz.:

"*Jefferson County Bank, ss*: Be it remembered, that on the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixteen, personally appeared before me John Cowles, one of the justices of the peace for the said county, Frederick White, president, and James Wood, cashier of the Jefferson County Bank; and each being duly sworn, say that the sum of twelve and a half *per centum* in specie has been actually paid into the bank on each share of the capital stock of the said bank.

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Frederick White,
James Wood.

"Sworn and subscribed to this 31st day of December, 1816, before me, John Cowles, justice of the peace for the county of Jefferson. } Filed Jan. 1, 1817."

"*Clerk's Office,* }
Jefferson County, } *ss.* I, H. H. Sherwood, clerk of the
[L. s.] } county of Jefferson, and clerk of the
court of common pleas, do hereby certify that the foregoing
is a true copy of the original declaration and certification

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now on file in this office. In testimony whereof I have hereunto set my hand and affixed the seal of the said court, this 6th day of November, 1823.

H. H. Sherwood."

The above certificate and act of incorporation were produced to show that the plaintiffs were a body politic and corporate, and had complied with the requisite conditions of the charter to enable them to go into operation as a bank.

The defendant's counsel object to this affidavit, on the ground that John Cowles was not, as a justice of the peace, authorized to take the affidavit, which objection the court overruled, and the counsel for the defendant excepted.

The plaintiff below here rested.

The counsel for the defendant below then moved for a nonsuit, on the ground that the plaintiffs had not proved that they were a corporate body, and that the records of the bank ought to be produced. And the court ruled that the act and certificate thus proved were not sufficient evidence of the incorporation of the bank.

The plaintiffs below then produced a book purporting to contain the records of the bank. The plaintiff's counsel read in evidence the following extracts from this book :

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*"Director's proceedings continued. December 2d, 1816. Resolved, that James Wood be, and is hereby appointed cashier of the Jefferson County Bank, and that his compensation shall be twelve hundred and fifty dollars per anno, commencing the 16th day of Nov. last. Directors' room, December 31st, 1816. At a meeting of the directors of the Jefferson County Bank, present Messrs. Wood, &c. (naming 10 directors.) The board being informed of the death of John Paddock, president of said bank, it was on motion resolved that they proceed to the choice of a president by ballot. Whereupon, the votes being taken and counted, it appeared that Frederick White was chosen president of said bank."

The plaintiff's counsel here again rested his cause ; and the counsel for the defendant moved for a nonsuit, on the ground that all the issues in the pleadings were not proved.

The counsel for the plaintiffs contended that *every material issue* was proved, and the court overruled the motion for a nonsuit.

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The plaintiff's counsel then offered to prove all the issues contained in the pleadings, and a compliance on the part of the bank with the terms of its charter, so far as they were put in issue of the pleadings; but the court rejected the evidence as unnecessary, to which the plaintiff's counsel excepted.

The plaintiffs also proved, by one of the witnesses, that they were in operation as a bank in 1816 or 1817, and also were in operation as a bank at the time this note was discounted.

The defendant's counsel then, as one ground of defence, introduced the following memorandum or contract, made by and between Heath, the maker of the note, and Orville Hungerford, the cashier of the bank:

"Whereas, The President, Directors & Co. of the Jefferson County Bank hold a note against me for one hundred and fifty dollars with interest, dated May 14th, 1825, and endorsed by James Wood of Brownville, now in case the said President, Directors & Co. will prosecute the said James Wood thereon, and it cannot be collected of him, I hereby agree to give security for the said note, with the costs that *may accrue against Wood, payable in two years from this date; they assigning the judgment against Wood to me. Oct. 5th, 1825. LEVI HEATH."

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This contract or memorandum was produced in evidence by the plaintiffs, in consequence of the defendant's attorney giving the plaintiffs notice to produce it on the trial, and under the order of the court, and after objecting to the same as inadmissible.

Oren Stone, one of the directors of the bank, testified that this contract was made without the knowledge or assent of the directors of the bank; that the subject of the above arrangement, however, came before the board of directors on the first Monday in May, and the first Monday in June; but they came to no determination, and passed no resolution on the subject, and no entry was made upon the

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records of the bank relating to it; but that the arrangement came to the knowledge of the directors of the bank on the first Monday in May last, at which time nor since has any thing been done about it.

The court decided that the above testimony was not sufficient to show a variation in the terms of the contract between the holders and the maker, and did not amount to a defence of the action, and rejected the evidence. The counsel for the defendant excepted. Judgment for the plaintiffs below.

J. A. Spencer, for the plaintiff in error. There is no breach as to the money count. This is fatal, and not amendable. (1 Chit. Pl. 828, 325, 327. Com. Dig. Pl. (C. 44.) id. (C. 69.) 15 John. 408, 4. 1 John Rep. 505. 1 Caines, 347; 349, 583. Lawes on Pl. in Assumpsit, 282.)

The court erred in admitting the copy of the affidavit. It was taken before a magistrate who is not authorized to take affidavits to be read in a court of record. There is no statute or common law authority for a justice to take such an affidavit. The act of incorporation requiring the affidavit, is silent as to the officer. (Laws of N. Y. sess. 1816, p. 280, last proviso to sect. 1.) But it requires the affidavit to be filed with the clerk of the county, where, or in this court, it might be necessary to read it in evidence.

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*If properly admitted, however, it proves nothing as to the existence of the corporation.

The court erred in deciding that the issues taken upon the plaintiff's replication were not material. Though the bank might have demurred specially, yet they did not do so; but replied specially, and shall be holden to their replication. (10 John. 156.) The books of the bank did not prove the facts replied, even if admissible; but they were not identified as the books of the bank. The testimony of witnesses at least should have been produced to identify and authenticate the books.

But the time of paying the note was extended in favor of the maker. This discharged the endorser. (3 Camp

281, 362. 16 John. 72. Chit. on Bills, Georgetown ed.
 208, 299, 300. Doug. 247. 3 Mod. 87. 2 John. Ch. Rep.
 560. 2 B. & P. 61. 16 John. 73. 12 John. 300. Com.
 on Contr. 244. 2 Ld. Raym. 928. Com. Rep. 138. Holt's
 Rep. 464.)

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M. Sterling, contra. The defect in the declaration is cured by the verdict. (2 Archb. Pr. 232, 239, and the authorities there cited.) The plea of *null tiel corporation*, is bad on special demurrer, (19 John. 300;) but I admit we must abide our replication, and prove under it sufficient to show that the plaintiffs below were a corporation. We must do the same thing under our replication, which would be required on the general issue: but we need not go further.

The affidavit was properly taken. The act not prescribing the person before whom it shall be taken, leaves it open for any one to administer the oath who can take an affidavit for any purpose. And after that, showing by the books or otherwise that the institution was in full operation with its requisite officers, is sufficient to establish its existence. The books were not objected to below, on the ground that they were not identified as the corporate books; and we proved every thing required by the charter as a condition precedent to becoming a corporation. Indeed, it is doubtful whether any proof was necessary beyond the mere production of the act in the printed statute book; and we think it will be found this court so decided in *The Bank of Chenango v. Noyes*.

*As to the objection that the bank gave time to the maker of this note, we agree that in general the holder discharges the endorser by tampering with the maker to the prejudice of the former. Otherwise he cannot complain. The rule is, that the holder shall not give time to the *prejudice* of the endorser. (2 John. Ch. Rep. 560, and the cases there cited. 6 Ves. 734. 10 East, 40.) What are the rights of an endorser? On notice, it is his duty to pay the note; and on doing so, he has a right to recover over of the maker. If the bank have done any thing to defeat his remedy over,

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it is a defence; otherwise not. The endorser may demand that the note be prosecuted; and if the holder refuse, this may operate as a discharge. But in any arrangement, if the endorser's rights are all reserved, he cannot complain. The only question is, whether the bank have so varied or modified the note as to infringe on the endorser's rights. This agreement is neither a technical release, nor a consent not to sue the maker; nor is there any evidence that the bank had not prosecuted this very maker to execution, and had a return of *nulla bona* against him. If the agreement were express for delay, it would be void; for there is no consideration mentioned in it. The maker could not have availed himself of it as a defence. It is not signed or executed either by the bank or cashier; and is in truth, nothing but a proposition to the bank through their cashier.

Spencer, in reply, said the consideration of the agreement was security for payment of costs, by the maker, of the suit against the endorser, which, before the agreement, the maker was not bound to pay.

Curia, per SAVAGE, Ch. J. (after stating the case.) It is contended that judgment should be reversed, because,

1. There are two counts in the declaration, and the conclusion refers to but one count. This seems to be the fact; but the mistake is merely clerical, and an amendment would be granted; so that the judgment should not be reversed on that ground.

2. It is said that the affidavit of the president and cashier, made before a justice of the peace, should not have been *admitted; as affidavits thus taken cannot be read in this court. The statute does not require the affidavit to be made before such an officer. It is a sufficient compliance with the act if made before any officer authorized to administer an oath.

3. It is urged that the plaintiffs below should have been required to prove the facts stated in the replication to the defendant's second plea. To this, the plaintiffs answer, that the plea itself of *nul tiel corporation* is bad, and any

issues joined upon it are immaterial; and that the plaintiff is bound to prove no more than he would upon the general issue. So the court below decided, and correctly. It is well settled, that a corporation plaintiff must, upon a plea of the general issue, prove the existence of the corporation. [1] The plea of *nul tiel corporation* is bad, because it amounts to the general issue: [2] What did the plaintiffs prove? They show the act of incorporation, by which such persons as should become stockholders in a certain mode pointed out by the act, should be a corporation. The act did not make any set of men a corporation *ipso facto*. There was something to be done. Books of subscription were to be opened; stock was to be subscribed for; that stock was to be distributed by the commissioners; and those persons to whom the stock should be thus distributed become stockholders. The stockholders then were to choose directors, and they a president and cashier.

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The books of the bank were produced showing the election of the president and cashier. No notes were to be issued till the officers should file an affidavit, &c. That affidavit was made and filed by White and Wood, describing themselves as president and cashier.

The production of the books showing the election of the officers was, *prima facie*, sufficient to show that the previous requisition of the statute had been complied with, and that the corporation then had an existence; and the proof of the filing of the affidavit shows that the bank had authority to issue bills and discount notes. [3] Enough was proved, therefore, to entitle the plaintiffs to recover upon their own showing.

It was said at the bar, that this court had decided, in the case of the *Chenango Bank v. Noyes*, that all which *was

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[1] *Williams v. The Bank of Michigan*, 7 Wen. 539.

[2] When to a plea of *nul tiel corporation*, replication is made of the title of the act of incorporation (R. S.), such title must be set out with entire accuracy, as a variance in the statement would be good cause for demurrer if the act is a public one. *Union Bank v. Dewey*, 1 Sanf. S. C. Rep. 509.

[3] See also *Utica Ins. Co. v. Tillman*, 1 Wen. 554. *The Same v. Cadwell*, 3 id. 296.

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necessary to prove the corporation, was to produce the charter in the printed statute book. The question there presented, as it was understood by the court, was, whether the printed statute book, or an exemplification from the secretary of state, should be produced to prove the charter; and we decided that the statute, as printed by the printer to the state, was sufficient.

The next question is, whether the defendant was discharged as endorser by virtue of the arrangement between the cashier and the maker; According to the written agreement, the maker of the note stipulates, that if the plaintiffs will prosecute the endorser, and the debt cannot be collected, the maker will give security for the debt, payable in two years, on his receiving an assignment of the judgment.

In this court, the maker is considered the principal debtor, and the endorser as a surety; and the surety is bound by the terms of his contract. If the creditor, by agreement with the principal debtor, without the consent of the surety, varies these terms by enlarging the time of performance, the surety is discharged; for he is injured, and his risk is increased. [1] (16 John. 72, 3.) Lord Eldon, in *English v. Derby*, (2 B. & P. 62,) says, as long as the holder is passive, all his remedies remain; [2] and if any of the parties be discharged by the act of law, the holder is not prejudiced as to the others. But if a holder enter into an agreement with a prior endorser in the morning, not to sue him for a certain period of time, and then oblige a subsequent endorsee in the evening to pay the debt, the

[1] See *Catskill Bank v. Messenger*, ante, 37, 38, n. 1. *Sprigg v. The Mount Pleasant Bank*, 14 Peters 257. But to discharge the surety the agreement must be binding in law, and founded on a sufficient consideration. Per Bronson, J., in *Villas v. Jones*, 1 Comst. 286. *Bank United States v. Hatch*, 6 Peters, 250. *Creath's Adm'r. v. Sims*, 5 How. U. S. Rep. 192. *Bangs v. Strong*, 7 Hill, 250. Mere voluntary indulgence to the principal debtor by the plaintiff in an execution, will not release the surety. *Id. Lenox v. Pruth*, 3 Wheat. 520. *United States v. Nichols*, 12 id. 505. *Schroppel v. Shaw*, 5 Barb. S. C. Rep. 580.

[2] See also per Story, J. in *McLornie v. Powell*, 12 Wheat 534: 6 Cow. Rep. 634, 637.

latter must immediately resort to the very person for payment, to whom the holder has pledged his faith that he shall not be sued. Chancellor Kent, (2 John. Ch. R. 560,) gives the reason why the terms of the contract shall not be varied without the consent of the surety. He says, the surety is entitled to pay the debt when it becomes due; or, he may call on the creditor, by the aid of this court, (chancery,) to enforce his demand against the principal debtor. On paying the debt, he is entitled to the creditor's place by substitution; [1] and if the creditor, by agreement with the principal debtor, without the surety's consent has disabled himself from suing, when he would otherwise have been entitled to sue under the original contract, or has deprived the surety, on his paying the debt, from having immediate recourse to his principal, the contract is varied to his prejudice, and he is consequently discharged. [2] This is the true principle to be extracted from the cases.

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Suppose then, the bank had authorized the cashier to take the writing which he did; does it contain any agreement not to sue Heath? Certainly not, until the bank shall have failed to collect the demand from the endorser. It is strange, indeed, that the creditor should agree with the debtor to prosecute the surety first; but I do not see that the endorser is deprived of his remedy over against the debtor. He may pay the debt, and prosecute the maker immediately. There is no stipulation that the bank shall not prosecute the maker at the same time with the endorser; and time is not to be given unless the endorser is unable to pay. This agreement, therefore, does not prejudice the endorser.

[1] *New York State Bank v. Fletcher*, 5 Wen. 85. *Bonney v. Seoley*, 2 *id.* 481. *Edward v. Traver*, 6 Page, 521. *Cuyler v. Ensworth*, *id.* 82. *Wilkes v. Harper*, 2 Barb. Ch. Rep. 338. *Matthews v. Aiken*, 1 Comst. 595.

[2] *Huffman v. Hulbert*, 13 Wen. 375. *Sprigg v. The Bank of Mount Pleasant*, 14 Peters, 201. *Gahn v. Niemcewicz's ex'rs.* 11 Wen. 312. *Schroepfel v. Shaw*, 5 Barb. S. C. Rep. 580. See further Dig. N. Y. Rep. by Hogan, title, Principal and Surety; also Am. Ch. Dg. by Waterman; same title.

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But it does not appear to have been authorized by the directors and I much doubt the power of the cashier to make such an agreement. without special authority.

Judgment affirmed.

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*JACKSON, *ex dem.* J. S. and W. Brown, *against* BETTS.

To warrant the proof of a lost will, not shown to be destroyed, by parol, it must be shown that diligent search was made for

it at the place where it is most likely to be found; as in the desk where the testator usually kept his most valuable papers. [1]

Proof of a search for, or loss of a paper to warrant secondary evidence of its contents, may be made by the oath of a party in the cause, though he be interested.

Where the execution of a will is established, there must, in order to revoke it, be some outward and visible sign of revocation, or cancelling *animo revocandi*.

If a man let his will stand till his death, it is his will; otherwise not. It is ambulatory till his death.

A man, when he makes his will, may disregard the claims of his children, and will his property to a stranger, if he be so disposed.

The situation of any of his children or grand-children, as to property, and the comparative inadequacy or inequality of a provision for them in his will, are inadmissible to show an express or implied revocation.

If a will be once duly executed, and once an existing will in the hands of the testator, unless there be evidence of its having been cancelled or otherwise revoked by the testator, the law presumes its continued existence of the time of his death.

Where facts are not disputed, the law on those facts is to be declared by the court. But where the law and the fact are so blended that they cannot be separated, the jury pass on both, under the advice of the court.

Where facts are conceded or fully established, it is the duty of the judge to state the law arising on the facts to the jury, whose duty it is to receive it from the court. If he err, the supreme court will correct the error; but counsel have no right to argue to the jury a question upon facts which the judge pronounces to leave no question open.

Proof that a testator after having made his will, took certain papers out of his desk where he kept all his valuable papers, and burnt the papers taken out, without showing that the will was among them, is not sufficient evidence to go to the jury, upon the question of revocation, even in connection with the fact that the will could not be found at the testator's death. Nor should counsel be allowed to urge these matters to the jury as evidence from which they may infer a revocation.

Whether it would be competent evidence, in order to repel proof which might admit a presumption that a will had been cancelled, that the testator went to the house of a friend, and requested him to draw a codicil to his will, but which was not done? *Quere*.

What shall be taken as part of the *res gesta* of a transaction, and not a mere declaration Discussed by counsel on principle and authority.

[1] S. C. on error, 6 Wen. 173, 176.

granting a new trial, the ground of which may be seen in 6 Cowen, 377, S. C.

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On the trial, the lessors claimed as devisees, not as heirs, of Benajah Brown deceased; and the defendant admitted that the lessors were the children of Benajah Brown, who died seised of the premises in question in May, 1822, and that the defendant was in possession when this suit was brought.

The plaintiff then called William L. Marcy as a witness, who testified, that in the autumn of 1816, the deceased called on him to draw a will for the deceased, which the witness did; and the deceased executed it in presence of three witnesses, and those three witnesses signed their names to the will in the presence of the deceased, and of each other. The witness was one of the three, and James Mallory another, and who was the third he could not recollect; but, from the circumstance of the deceased depending on him to see that the will was properly executed, he had no doubt the third witness was credible. James Mallory, called by the plaintiff, swore that the will was made November 9th, 1816, at the office then occupied by the witness and Mr. Marcy, at Troy; that after it was executed, on the same day, the deceased delivered it to the witness for safe keeping, and the witness gave the deceased a receipt for it, which the witness now had. In the summer or fall of 1821, the deceased took the will from the witness, stating that he the deceased, wished to make some alteration. Since the death of the deceased, the defendant told the witness that James Brown, one of the lessors, had been up to Brunswick from Westchester, and looked for the will in the desk where Brown supposed it was left, and it could not be found there. Ezra Lockwood, called by the plaintiff, testified that the deceased was at the witness' house in Poundridge, (Westchester,) in July, 1821, and he, at the request of the deceased, drew a codicil to the will of the deceased, which was, at that time, exhibited to the witness, and which he then opened and read. He remembered the witness to the will, Messrs. Marcy and Mallory, but had forgotten the third. The codicil referred and was attached to the will,

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before the codicil was executed; and afterwards the codicil and will were put into the same paper envelope from which the will was taken, and handed back to the deceased

The plaintiff then offered to prove by the last witness, that the day before the deceased was taken sick, he called on the witness at his dwelling house in Poundridge, and requested him to draw a codicil to his will. To the admission of this testimony, the defendant objected, unless the plaintiff proved that a codicil was then drawn. The judge admitted the testimony, *on the ground that it was an act of the deceased, and the defendant excepted.

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Lockwood then testified, that the day before the deceased was taken sick, in May, 1822, he called at the witness' dwelling house in Poundridge, and requested the witness to draw another codicil to his will; but that the witness did not draw one. The will was not then produced; and the deceased died about two weeks after.

James Brown, one of the lessors of the plaintiff, was then offered by the plaintiff to prove the loss and due search for the will. He was objected to as incompetent; but admitted, and the defendant excepted.

Brown testified that he made search for the will in the desk at the deceased's house in Brunswick, the place where he usually kept his papers, and where he found some of the deceased's obligations and deeds, and other papers; but could not find his will. He made a second and more thorough search in the same place, in which he was assisted by Weed Brown and Albert Lockwood. The search was made a little more than a week after the deceased's death. He also searched the pockets and pocket book of the deceased, but failed to find it. Cross-examined, he said when the deceased arrived at Poundridge on his last visit, he stopped at Silas Brown's (one other of the lessors of the plaintiff) where he spent a portion of his time previous to his being taken sick; and another portion of his time he had spent with two of his daughters living in that vicinity. He was taken sick at the witness' house; where he remained till he died. During his sickness, the witness sent a messenger to his connexions at Brunswick, inform-

ing them of the sickness of the deceased ; and Mrs. Ayres, the sister of the witness, went from Brunswick to Poundridge with that messenger, and remained with the deceased, taking care of him until his death. About a week after the the deceased's death, the witness left Poundridge, in company with Mrs. Ayres, and arrived at Brunswick on Saturday, and on the Monday morning following the search was made. He did not know that the deceased's death was known at Brunswick, until he arrived, had not written informing his connexions there of the death. *Mrs. Ayres had, some time previous to his death, lived in the deceased's house in Brunswick ; and so had Harvey Betts, a nephew of the witness, the son of the defendant, who then occupied the room where the desk of the deceased was. That he found the key of the desk in a chest not locked, in the same house ; and on searching, he examined every part of the desk. He found in the desk quite a large quantity of papers, among which were the notes, deeds and other valuable papers of the deceased.

The plaintiff then offered parol evidence of the contents of the will, which was objected to, on the ground that the plaintiff had not sufficiently accounted for its non-production. The objection was overruled, and the defendant excepted.

Mr. Marcy, then called again, testified that the will devised one sixth of the deceased's real and personal estate to each of his sons, James, Weed, Seth, Jotham and Silas ; one sixth to James, his son, in trust, to pay the avails, during the life of Benajah, another son of the deceased, to his (B.'s) children, remainder of the one sixth, after his death, to be paid to his children : charging the whole with the payment of \$200 to each of the deceased's daughters, and the like sum to Sanford Selleck, his grandson.

Mr. Lockwood, called again, testified that the codicil altered the will in nothing, except in giving to James Brown, in trust for Seth and Jotham Brown, what was devised by the will directly to them.

Hereupon the plaintiff rested ; and the defendant then called

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Thaddeus Dann, who testified that the deceased had living, at his death, six sons and six daughters, and one grandson, the son of a deceased daughter. That Nancy Ayres, one of the daughters, was at that time unmarried, and had from the time of her mother's death, lived in the family of her father the principal part of the time. Her mother died about two years before. That the witness accompanied the deceased to Poundridge, in April or May, 1822, who took with him on that journey a trunk.

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The defendant then offered to prove, that one of the deceased's daughters was, at the time of his death, the mother of a large family of children, and that the father and mother of those children were wholly unable to support them; and the respective situation, as to property, of the other children of the deceased. The plaintiff objected to this evidence as inadmissible, the judge allowed the objection, and the defendant excepted.

Nancy Ayres, called by the defendant, testified that she is a daughter of the deceased; and lived at his house in Brunswick at the time of his death, when he had been absent about three weeks. He took with him a trunk when he left for Poundridge, which he borrowed of her brother, Weed Brown; took papers with him in his trunk. When she went to put her father's linen into the trunk, she saw a bundle of papers in it, did not move or examine them, but should judge they were two or three inches thick. For two or three months before her father left home, she thought he seemed to be putting his house in order, and so remarked to her sister. A short time before he left home he was very attentive to the arrangement of his papers at his desk. Once or twice she saw him burn papers, which he took from the desk; and which was the only place he occupied for his papers. It was in the house where he resided, and he had but one desk. Some time before he went away, he took some papers, or something that looked like papers, to Troy. He was 72 years of age in February, 1822, and died in May following.

The plaintiff, then offered Weed Brown, (one of the lessors of the plaintiff,) to prove search for the will. He was

objected to as incompetent, but received; and the defendant excepted.

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He testified that the trunk mentioned by Mrs. Ayres was his; and he examined it in Poundridge, a few days before the deceased died, and while he lay sick. There were two or three loose papers in it; but the will was not there. It was unlocked, at that time, at his brother Silas' house. Being cross examined, he said he lent the trunk to the deceased; that he lived in Brunswick, and when he heard of his father's illness, he went down, and returned before his father's death, and brought the trunk home with him to Brunswick.

*The defendant then called Mr. Mallory, (before sworn for the plaintiff,) who said the defendant in the spring or summer of 1822, in Troy, told the witness that James Brown had been up to Brunswick, and searched for the will; and that it could not be found. Mrs. Ayers, again called by the defendant, said a short time before her father left home in 1822, he took something from his desk in a silk handkerchief, which appeared like papers. He appeared to be sly about it; and was going to Troy. Cross-examined, she was not certain they were papers, nor did she see him take the handkerchief from the desk; but he had been to the desk, and had something wrapped in his handkerchief.

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The plaintiff here rested.

The judge decided, that if the will was duly executed, and once an existing will, and in the hands of the testator, unless there be evidence of its having been cancelled or revoked by the testator, the law presumed its continued existence to the death of the testator. That the facts proved by the defendant were not sufficient, in judgment of law, to warrant the inference that the will had been cancelled or destroyed by the testator, or to justify the jury in finding that the testator revoked his will; and that he should so state the law to them; and that the counsel for the defendant could not be permitted to argue to the jury, that these facts alone would justify them in finding that

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the will had been revoked. To these opinions and decisions the defendant excepted.

The jury found a verdict for the plaintiff; and a motion was now made in behalf of the defendant for a new trial.

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J. Paine, for the defendant. The only difference between the case as it now stands, in respect to the proof of a will, and when it was before the court as reported in 6 Cowen, 377, is, that here we have no direct account of any will after the drawing of the codicil in July, 1821. The testimony of Lockwood, that the deceased called on him respecting a codicil, the day before he was taken sick in 1822, was objected to at the trial as inadmissible to prove anything concerning the will; and being admitted, is now made a point for a new trial. When this matter was before the court on the question * of partition, the propriety of admitting declarations in respect to the revocation of a will was considered; and it was held, that unless they accompanied and were used to explain an act which might otherwise be equivocal, they were not admissible, because not a part of the *res gestæ*. (*Dan v. Brown*, 4 Cowen, 483.) The same principle extends to a declaration respecting the existence or continuance of a will. *Smith v. Fenner*, (1 Gall. Rep. 170, 172,) went one step farther than former cases; but held that the declaration of a testator must be so near to the time of executing the will as to be a part of the *res gestæ*, or it was not admissible; that other declarations are in the nature of hearsay. In that case the evidence was confined to declarations made immediately after the execution. Subsequent declarations as to the testator's intentions were overruled. *Res gestæ* mean the surrounding facts of a transaction, which aid our inferences as to the fact in dispute. The declaration must not be one merely in the abstract; but it must be a fact in a transaction. (1 Stark. Ev. 39, 47.) The declaration must itself be an act or thing done, which is a literal translation of *res gestæ*. Here were no acts done when the application was made to Lockwood. He drew no codicil.

The declaration could not form a part of the *res gestæ* because there were none. It was naked hearsay within the case of *Smith v. Fenner*. Is such evidence admissible to show the existence of a will? The evidence cannot be urged in any other view; and receiving it in that view, allows a will of lands to be established or fortified by hearsay; and trenches directly on the statute of frauds. It is in the face of what this court have twice decided in this very cause. (4 Cowen, 483. 6 Cowen, 377.) James and Weed Brown were incompetent witnesses. At any rate they were inadmissible to prove anything more than the fact of searching for the will, and the place or places, time or times at which search was made; and the proof on this head was premature. The loss could not be proved till the execution and continued existence of the will were fully established up to the time of the testator's death. That, as we trust we shall be able to show, was a question for the jury; and that it was held to be so in 6 Cowen. Of course *the loss could not be shown to the court as a preliminary to the inferior or parol proof. And not being receivable in that view the parol proof was altogether inadmissible to show the contents of the will. A case for parol evidence was not made out. The loss should have been proved by other witnesses; and at least the question of loss have gone to the jury.

The evidence offered by the defendant to show the situation of one of the daughters of the deceased, and of her family, ought to have been admitted.

The decision of the judge that the law presumed the will to have been in existence at the time of the testator's death, was incorrect. There was no express evidence that the will was *in esse* when the testator died. This certainly must be shown in some way, or it is not the testator's will; for it cannot take effect till his death. Up to that time it is ambulatory. (*Goodright v. Glazier*, 4 Burr. 2512, 2514.) The party who alleges the affirmative must prove it. (1 Stark. Ev. 376.) The statute of wills (1 R. L. 365, § 3,) provides five modes of revoking a devise. One is by declaring the revocation in writing attested, as the devise must

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be, by three witnesses. The other modes are by burning, cancelling, tearing or obliterating, and either of them may be done in secret as well as in the presence of witnesses. If we rely on a revocation by a writing, we must prove it. The affirmative lies with us; but it is otherwise in respect to burning, &c. The parties setting up the will must show its existence at the time of the death, so as to negative its destruction by the testator. Here the will is not found at all, after the most rigorous search. Is not the presumption stronger that it was destroyed than that it existed at the death? The law will not presume that it was fraudulently destroyed by the heirs or any one of them; but the contrary, until the fraud is shown. (4 Stark. Ev. 1242. 1 Wils. 310.) From the nature of the case, we could not prove the act of cancellation, or destruction; for it must have been in secret. We are thrown upon the best evidence which the law sees to be in our power; and are entitled to the benefit of it with the jury. (1 Stark. Ev. 102.) The highest evidence we can have is the absence of the will. The inference of revocation to be derived from the mere non-production of the will, was not made a point in *Dan v. Brown*, nor when this case was before the court the second time; and it is therefore fairly open for discussion now. In the trial of this cause before, at the circuit, the judge who presided there recognized the non-production as evidence of revocation. Full force was allowed to it in *Loxley v. Jackson* (3 Phillimore's Eccl. Rep. 128,) and the rule is laid down by Starkie as a part of the common law. (4 Stark. Ev. 1242, 1715.) The very point decided in *Loxley v. Jackson* was, that if a will proved to have been executed, and which after execution remained in the custody of the testator, cannot be found after his death, a presumption arises that he has cancelled the will; and the burthen of proving the contrary, is thrown on the party alleging it. In *Legare et ux. v. Ashe and others*, (1 Bay's S. C. Rep. 464,) the same rule of presumption is recognized as existing in the common law courts. One of the court directed the jury that the last will not appearing at the death, was strong evidence of revocation. The other two judges

agreed that the non-production of it was *prima facie* a presumption that it was cancelled, but not a legal conclusion ; and therefore might be met and done away by circumstances. These were put to the jury, who found in favor of the will. We suppose, then, we have proved that his honor, the judge, erred in charging that the law presumed the existence of the will at the death, unless the contrary was proved ; and that there should be a new trial on this ground, if on no other.

But we also insist that his honor, the judge, at any rate, erred in not permitting the counsel for the defendant to argue to the jury that the evidence would justify them in finding a revocation or destruction by the testator. We are not bound to maintain that they *must* have so found upon the evidence ; but only that they might have so found or not, it being a question fit for them. We have seen the force attributable to the circumstance that no will was found at the death ; its total absence ; its non-production ; and no account rendered of it. If this alone would not warrant the jury in finding a revocation, then we ask to combine it with the evidence of Mrs. Ayers. This court decided expressly, when the cause came before them from the first trial of the ejectment, that Mrs Ayers' testimony alone formed a fit question for the jury. Such is the language of Sutherland, J. who gave the opinion of the court. His honor, the judge, at the circuit, treated this as an *obiter dictum* ; but we say, with great deference, it was in point. It was necessary to the final disposition of the cause. There were several points upon which it was held the judge at the circuit erred in that case. The court say so, and grant a new trial. The argument which makes the decision of any one of those points *obiter*, makes them all so ; and nothing was decided by the case, from which the circuit judge might not depart at his pleasure. The object of motions for a new trial is, to settle all the points on which the judge may have passed, in order to instruct him as to his course ; otherwise, there must be a new trial of the whole cause for each single point ; and litigation will be end-

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less. If the decision was fairly in the course of the duty of the bench, it was not *obiter*.

J. P. Cushman and *A. Van Vechten*, contra, stated these points: 1. The execution of the will and its contents were duly proved; 2. The lessors (James and Weed Brown) were competent witnesses to the court, to prove due search for the will, and that it could not be found; 3. The acts of the testator when he applied to make a second codicil, were competent evidence; 4. The facts proved on the part of the defendant were not sufficient to raise the presumption that the testator had revoked the will and codicil; and his honor did right in not allowing the contrary to be argued to the jury.

They said most of the points raised on either side had been settled in the course of this very litigation, and need not be farther noticed. Thus, that the execution of the will was sufficiently proved, and its absence accounted for so as to let in parol proof, were decided; and we also supposed that this very case had settled, that where a will of lands is once duly proved, it shall be presumed to continue until the contrary is established. In *Dan v. Brown*, the second head of argument made by the court presents and settles this very position. The second point made by the plaintiff's counsel *presented it distinctly to the court. It asks to exclude the testator's declarations, on the ground that they are not admissible to repel the presumption that the will had been destroyed. The court answer, there was no such presumption to repel; but that it was the other way. This decision was the reason why we did not now call Mrs. Ayers to show the subsequent and continued existence of the will, down nearly to the time of the death.

The testimony of Lockwood, in respect to the testator's application to him to draw a second codicil, is said to be mere declaration or hearsay, and no part of the *res gestæ*. The argument is founded on the supposition that the *res gestæ* are the making of the will and its immediate incidents. They are not confined to that, but include every

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thing done in respect to the will. Acts were done for the purpose of making a second codicil. For this purpose the testator travelled to Lockwood's house. The purpose is formed, directions given and abandoned. It is the same thing as asking counsel to write his codicil, the counsel going on with the writing half way, and then abandoning it. The act of the counsel would be the act of the testator. It would be a *res gesta*. In either case there is an act done, though it is without any direct effect. We show the testator has done something in relation to the will; and this was important, as showing the continuance of the will to the very day of the last sickness, during which, if there had been any alteration or revocation, we should have heard of it.

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As to the necessity of proving the continued existence of the will, if there was any, it is satisfied up to the last sickness. We had supposed, however, there was none, that this question was *res judicata* in this very cause; and certainly the case of *Legare et ux. v. Ashe*, will not be received to shake such authority. But it does not apply. The strong circumstantial evidence in that case showed the continuance of the will to the last moment; and it was not necessary to call in the aid of presumptive continuance. *Loxley v. Jackson* gives us the rule of the ecclesiastical court, which has cognizance of testaments respecting personal property alone. Our statute of devises prescribes certain modes of revocation for a *will of lands; [*219] and one of these must be shown affirmatively, and cannot be presumed from the mere failure to find the will. The prerogative courts have nothing to do with devises. Parol admissions in respect to revocations are admissible there. (1 *Phillimore's Eccl. Rep.* 469. 2 *id.* 427. 2 *Addam's Eccl. Rep.* 223.)

As to the withholding of the case from the jury, where the testimony is insufficient to maintain a position, the judge may always act without the aid of the jury. The same defect which would authorize him to nonsuit, would sanction the withholding testimony from the jury, introduced by way of defence. It follows, that in the latter case he

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may prevent counsel from commenting upon the facts to the jury. A judge is bound to nonsuit, where the testimony fails to make out the plaintiff's case. If he refuse to do so, it is error, (*Foot v. Sabin*, 19 John. 154.) The error would be on the other side, if he should refuse to overrule the defence where the testimony fails to make it out.

[SUTHERLAND, J. The question here is, whether the case was proper for the jury.]

[WOODWORTH, J. Yes. And that depends on the question whether there could be any dispute about the facts? If there be no dispute about them, then the court is at once and unqualifiedly to pronounce the law arising upon them.]

Or, in other words, whether any legitimate evidence whatever was given to establish a revocation, which could be left to the jury? whether there was any evidence of a revocation in presence of Mrs. Ayres? The *onus probandi* lay with the defendant. The fact of burning papers, unless there is also evidence that the will was among them, is nothing at all. Mrs. Ayres saw the testator take papers from the desk several times. Yet there can be no pretence that he destroyed his will more than once; much less is there any proof that he destroyed his will *animo revocandi*. Such testimony does not even begin to make the proof of revocation. Nothing was argued, or could be argued from the mere absence of the will. If it is necessary to add anything to the decision of this court, take the words of De Grey, Ch. J. in *Goodright v. Harwood*, (3 Wils. Rep. 513:) "When a man hath once declared properly what his mind is as to the disposition of his lands, upon doing that, he is presumed to continue of the same mind till his death, unless the contrary appears. The same presumption will stand upon a second will or declaration of his mind properly." In the case at bar, there are no facts on which a contrary presumption can rest. It being so there was nothing for the jury. (*Jackson v*

Schauber, 7 Cowen, 187.) The trial by jury would be a great inconvenience, if courts were bound to submit questions of fact to them which there is no legal testimony to raise.

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Curia, per WOODWORTH, J. This cause first came before the court on a motion for a new trial; and is reported in 4 Cowen, 488. Several points were then adjudged. It was held that, to warrant the giving of parol evidence of the contents of a will not shown to be destroyed, it must be first proved that diligent search had been made at the place where it was most likely it would be found, and that such search might be proved by a party in the cause, though he be interested; it being addressed to the court in order to let in secondary proof. [1] It was also held that where the execution of a will is established, in order to revoke it, there must be some outward and visible sign of revocation or cancelling *animo revocandi*. [2]

A new trial was granted; and at the next trial the judge nonsuited the plaintiff, on the ground that it was necessary to show the existence of the will subsequent to the execution of the codicil. This court held that there was sufficient evidence to go to the jury; and that it should have been submitted to them. (6 Cowen, 877.) It is here proper to observe, that the court were not called on to decide what was or was not sufficient evidence of revocation. When the judge nonsuited the plaintiff, the cause had not arrived at a point when it was necessary to pass on the defence. He had not, and could not with propriety, have been called on to express an opinion as to the proof of revocation. The nonsuit was for defect of proof on the part of the plaintiff, that it was *prima facie* insufficient; consequently if there are expressions in the opinion

[1] As to the amount of proof necessary to establish the loss of original papers, and admit secondary evidence as to their contents, &c., see 2 Cowen & Hill's notes to Phil. Ev. 441, *et seq.* where a synopsis of all the leading authorities on this subject may be found.

[2] A lunatic is incompetent to revoke a will. *Smith v. Walt*, 4 Barb. S. C. Rep. 28.

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delivered, which go *beyond the question presented to us, they form no part of the point decided, and are liable to be examined and tested by the rules of law.

On the last trial, the counsel for the defendant cited the case in 6 Cowen, to prove that the evidence offered for the purpose of showing a revocation, ought to be submitted to the jury to pass on. They relied on an expression in the opinion, that whether the will was among the papers which Mrs. Ayers testified her father burned in March, 1822, should also have been submitted to the jury. The force and relevancy of that testimony had never been argued or considered by the court; consequently the judge who held the circuit was at liberty to lay down the law differently, if the doctrine contended for was, in his opinion, incorrect. At the circuit, he thought the law otherwise, and so declared it. If he erred, it is not for disregarding an adjudged case; but in deciding incorrectly a point that had not been adjudged in this court. I will now proceed more particularly to consider the exceptions taken at the trial.

The plaintiff offered to prove that the day before the testator was taken sick, he called upon Lockwood and requested him to draw a codicil to his will. This evidence was objected to, but admitted. Lockwood testified that the testator applied to him to draw a codicil; but it was not done. The will was not produced.

It is not material, in the decision of this cause, whether Lockwood's testimony was competent or not; for it will be seen in the view taken, that the will was sufficiently proved independent of this evidence, and did not require its support. The rule is, that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will. It is ambulatory until his death. (4 Burr. 2514.)

The exception to the admissibility of Brown as a witness to the court, to prove the loss of the will, and that due search had been made, was properly overruled. The admissibility of this evidence had received the sanction of the court in 4 Cowen, 491. I will not therefore add any thing on this point.

The plaintiff offered parol evidence of the contents of the will, which was objected to on the ground that he had not *sufficiently accounted for the non-production. This was overruled.

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In 4 Cowen, 483, the court decided what was necessary to be made out in order to warrant the giving of parol evidence. It is believed that the rule there laid down was fully complied with; there being proof of diligent search for the will in places where it was most likely to be found.

The defendant then offered to prove that one of the daughters had a large family, and the parents were unable to support them; and also the situation in point of property of the other children. This was overruled as altogether irrelevant and afforded no ground of an implied revocation. These considerations were present to the mind of the testator when he made his will. It does not appear that they had arisen since its execution; but be that as it may, by law he had the absolute right to disregard the supposed claims of his children; and might have willed his property to a stranger, had he been so disposed. I am not aware of any case or principle that sanctions the competency of such evidence.

The opinion of the judge, as delivered at the close of the evidence, presents the most important question in this cause. He observed, "*that if the will was duly executed, and once an existing will, and in the hands of the testator, unless there be evidence of its having been cancelled or revoked by the testator, the law presumes its continued existence to the time of his death.*"

That this is a principle of the common law, seems to me well settled by authority. [1]

[1] This is not so; but a revocation is always presumed where a will is traced to the possession of the testator, and cannot be found at his death. S. C. on error, 6 Wen. 173, 182, *et seq.* See also *Legare & Wife v. Ash*, 1 Bay. 464. *Jones v. Murphy*, 8 Watts & S. 275. *Lawson v. Morrison*, 2 Dall. 286. *Lillie v. Lillie*, 3 Hagg. 148. *Wargent v. Holling*, 4 Hagg. 245. *Freeman v. Gibbons*, 2 Hagg. 328. *Colvin v. Fraser*, 2 Hagg. 266. So where a duplicate will was left with the testator and could not be found after his decease. *Richard v. Mumford*, 2 Phil. 23. See further, *Moor v. Metcalf*, & *De La Torre v. Moor*, 1 Phil. 375. And as the law does not under, such cir-

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The mere fact, that the will is not produced, raises no presumption that it has been cancelled, provided satisfactory evidence is given that, on diligent search in places where it would be most likely to find it, it could not be found. The court has heretofore decided, that on such proof, secondary evidence may be given and the will refer in evidence. To what purpose allow the copy of the will to be given in evidence, if, notwithstanding, the non-production of the original raises a presumption that it has been revoked? If such had been the intention of the court, they undoubtedly would have said, when this cause came before them in 4 Cowen, the plaintiff must, in addition to the proof of diligent search, repel the presumption of revocation. Proof of the first alone, is entirely useless unless accompanied by the other. That nothing of this kind was in the contemplation of the court, as necessary to give effect to the will, I think evident from their silence. This omission must have arisen from the opinion formed, that the latter fact was unnecessary. Let the question be examined on principle. The plaintiff is required to prove the will of the testator, and produce it, or show legal grounds for dispensing with the production of the original. If the facts proved are such as the law sanctions, and excuse the production of the will, then the copy or contents of the will proved, necessarily stand in the place of the original, and have the same legal effect. This principle is familiar in the case of all written instruments. If the original is lost or cannot be found, you may resort to secondary evidence; and if that is sufficient, it supplies the place of the paper lost, or which cannot be found. In these cases was it ever urged as an objection, that, after full proof of the contents,

circumstances, presume that the will was fraudulently destroyed, the burthen of proof rests on the party claiming under it. *Loxley v. Jackson*, 3 Phil. 128. Per chancellor in *Betts v. Jackson*, 6 Wen. 185. *Wilson v. Wilson*, 3 Phil. 582. *Durant v. Ashmore*, 2 Richardson's South Carolina R. 184.

But by the R. S. 4th ed. 254, § 8, no will can be proved as a lost or destroyed will, unless it shall have been proved to have been in existence at the testator's death, or shown to have been fraudulently destroyed in his lifetime; nor unless its provisions be clearly proved, by at least two witnesses, a correct copy being deemed equivalent to one witness.

undisputed and unquestioned, a party was not entitled to all the benefits that would have arisen had the original been produced? I am not aware that any such objection has ever been sustained or even raised. It will be seen that the question of law in all these cases is what evidence will enable a party to resort to secondary evidence, when the original cannot be produced? The principle is general; and whether applied to a will or a deed, has equal effect. It places a party on the same ground as if secondary evidence had not been needed. It substitutes the copy or proof of contents for the instrument lost, or not found. From the nature of the principle, then, it follows, that a party cannot legally be called on to prove more than would be required if the original had been produced; and, in that case, I apprehend no question of presumed revocation would be made, unless founded on other facts. That such was the opinion of the king's bench, is manifest from the case of *Harwood v. Goodwright*, (Cowper, 88.) In that case a special verdict was found, that in 1748, the testator made a will, setting it out, that in 1756, the testator made another will, duly attested *that the disposition was different from the will of 1748; but in what particulars was unknown to the jurors. They further say, that they do not find that the testator cancelled or destroyed the will of 1756; but what has become of the will they are altogether ignorant.

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The court decided, that although the latter will contained a different disposition from the former, yet, as the particulars of that difference were unknown, it was no revocation of the former will.

Here, then, was a case where secondary evidence was resorted to, and so much of the contents proved as to show there was a different disposition. No objection was raised by the counsel, or intimated by the court, that any presumption arose against the validity of the will by reason of its non-production. On the contrary it is manifest, the only difficulty was, that the jury were unable to find wherein the different disposition consisted. Had this been done, the court would have decided that the latter will revoked the former. This case was first decided in the common

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pleas, and is reported in 3 Wilson, 497. That court held, that the latter will revoked the first; no suggestion was made, that the non-production varied the plaintiff's rights. The only point was whether the contents were sufficiently found. Nares, justice, says, "the second will is not found to be cancelled or destroyed; therefore it must be considered as in being." De Grey, Ch. J., observes, "when a man hath once declared properly what his mind is, as to the disposition of his lands, upon doing that, he is presumed to continue of the same mind till his death, unless the contrary appears." The same doctrine is advanced by Sir John Nicholl, in *Johnston v. Johnston*, (1 Phillimore's Rep. 466.) He observes, "the general rule certainly is, that a will once executed, remains in force, unless revoked by some act done by the testator, *animo revocandi*, such as burning, cancelling, making a new will and the like." [1]

It is not perceived that there was any error in the opinion expressed by the judge at the trial on this part of the case. The residue of that opinion is in these words: "that the facts proved by the defendant were not sufficient, in judgment of law, to warrant the inference that the will had been cancelled or destroyed by the testator, or to justify the jury in finding that the testator revoked his will; and that the counsel for the defendant could not be permitted to argue to the jury that those acts alone would justify them to find that the will had been revoked."

If the judge was correct in laying down the law on the facts proved by the defendant, I presume it will be admitted, that the latter part of the opinion followed as a necessary consequence. Where facts are not disputed, the law arising on those facts is to be declared by the court. A different doctrine would at once invade the jurisdiction

[1] These opinions of Ch. J. De Grey, and Justice Nares in the common pleas, were overruled on error in the king's bench. 8 Cowper, 88. See also per Tallmadge in *Betts v. Jackson*, 6 Wen. 200. And the judgment of the king's bench was affirmed on appeal in the house of lords. See 7 Brown's Parl. Cas. 44. Nor does the case of *Johnston v. Johnston*, 1 Phillimore, 446, sustain the position for which it is cited in the text as it is analogous. There the will was present in court, and the question was, whether it had been revoked by the birth of children combined with other circumstances.

of the latter, and in effect transfer the decision of the law as well as the fact to the jury. Where the law and fact are so blended that they cannot be separated, the jury of necessity pass on both, under the advice of the court. If they err, the error will be corrected. But where the facts are conceded or fully established by proof, without contradiction, the law invariably adjudges as to the effect and operation of the facts. In such cases, it is the bounden duty of the court to state the law arising on the facts to the jury, whose duty it is to receive it as law from the court. In the present instance the judge stated the law merely, and the duty of the jury. If he erred, this court will correct the error; but can never sanction the claim of counsel to appeal from the decision of the court to the jury. That such would have been the effect in this case, is manifest. The defendant had proved certain facts, on which he relied to satisfy the jury the will had been revoked. The plaintiff admits the truth of the facts; the court decide that such facts are altogether insufficient; and are so considered in judgment of law. If the counsel argues to the jury, they are necessarily driven to contend that the facts are sufficient to warrant the jury in finding that the will was cancelled. It seems to me that no court would rightly discharge their duty in permitting such a course.

It only remains to consider, whether the facts were not wholly immaterial and irrelevant. They are the following: Lockwood drew a codicil, which did not vary the rights of the plaintiff in this action. He was employed to draw another, but did not; and no other appears to have been drawn.

*Nancy Ayres says the testator took with him a trunk when he left home the last time, and took papers with him in the trunk. She saw a bundle of papers, but did not move or examine them; thinks the bundle was two or three inches thick. A short time before he left home, he was very attentive to the arrangement of his papers at his desk. Once or twice *she saw him burn papers taken from the desk*. Some time before he went away, he took some papers, or something that looked like papers, to Troy.

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Mrs. Ayres, again examined, says, that a short time before her father went from home in 1822, he took something from the desk which appeared like papers. He appeared to be shy about it, and was going to Troy. On her cross-examination she was not certain it was papers her father had in his silk handkerchief; she did not see him take it from the desk; but he had been to the desk, and had something wrapped in it.

Having shown that this will was duly executed, it remained in force unless revoked. The statute has prescribed, (1 R. L. 365,) that no last will shall be revocable otherwise than by some other will or codicil, or by burning, cancelling, tearing or obliterating such last will by the testator himself, or in his presence and by his direction and consent. As to *burning*—once or twice he burnt papers taken from the desk. In the first place, everything else apart, the presumption would be that a will executed deliberately and recognized five years afterwards, when a codicil was added, was not among the papers burnt, and particularly when no act or declaration of the testator manifested the least dissatisfaction. There is no proof or presumption, that the will was among the papers. The essential fact is wanting. Where was the will? The witness is ignorant; but this fact must be supplied; and it can only be supplied by conjecture. Would any court be justified in instructing a jury, that on such facts they might presume the will was among the papers burnt? It appears to me that such a charge would be well calculated to break down the landmarks of the law; to divest estates upon mere suspicion, and virtually operate as a repeal of the third section of the statute of wills.

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*The residue of the proof is, if possible, less to the point. The testator took some papers with him in a trunk. At another time he had something in a handkerchief that appeared like papers. He had been at his desk, but the witness did not see him take it from the desk. He appeared shy, and was going to Troy. From this evidence also, the defendant wished to draw the inference of cancelling; and that, too, without evidence of the destruction of any

paper. The judge was gravely called on to permit the counsel to contend before the jury, that enough had been shown to find that the will had been revoked. If it had been proved even that the will was taken from the desk by the testator, it would be no evidence of its subsequent destruction. But to proceed a step farther, and contend that an unknown paper was taken, that the will was that paper, and must have been cancelled, appears to me a gratuitous assumption, not warranted by the testimony.

Believing as I do, upon full consideration, that the evidence of revocation entirely failed, I am of opinion that the motion for a new trial be denied. [1]

New trial denied.

LATHAM against EDGERTON.

ON error from the C. P. of Delaware.

S. Sherwood, for the plaintiff in error.

J. Sudam, contra.

Curia, per SUTHERLAND, J. This is a writ of error to the court of common pleas of the county of Delaware. From the return to the writ, it appears that the case came before the court below, upon the appeal of Edgerton from a judgment rendered against him, before a justice of the peace, in favor of Latham.

The justice's return to the court of common pleas consti-

[1] The decision of Judge Woodward was reversed on error. See S. C. 6 Wen. 173.

ment. And though the judgment be against the party succeeding before the justice, who pays it, yet it is not to be regarded as of any effect whatever; and an action will yet lie upon the original judgment before the justice.

The principle that a record cannot be impeached by pleading, is not applicable where there is a want of jurisdiction.

The want of jurisdiction makes a record utterly void, and unavailable for any purpose.

The want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it.

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Where the penalty of an appeal bond is not in double the amount of the damages and costs of the judgment rendered by the justice the appeal is void; the C. P. acquire no jurisdiction, and [*228]

the defect is not cured, though the parties appear and proceed to trial without raising the objection, and the court in fact hear, try and give judgment.

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tutes a part of the record; and shows that Latham sued Edgerton before the justice in an action of debt upon a judgment rendered by one Elisha B. Maynard, for \$34 damages, and \$4 19 costs.

Edgerton pleaded before the justice, that the judgment (if any was obtained) was discharged by virtue of an appeal therefrom to the court of common pleas, &c., where the cause, and issue on which the judgment was rendered and the subject matter thereof, were tried, and a verdict given and judgment rendered thereon in favor of Edgerton against Latham, which Latham voluntarily paid.

Latham replied, that the proceedings on the appeal suit were void, and the court had no jurisdiction, in as much as the bond on the appeal was not in the penal sum of double the amount of the damages and costs before the justice.

Edgerton rejoined, that Latham ought not to have his action, &c., because he duly appeared on the appeal, and never moved the C. P. to set it aside, but prosecuted the appeal to trial and judgment; whereby he waived his objection, and is estopped from denying the validity of the judgment.

To this rejoinder, Latham, the plaintiff before the justice, demurred, and Edgerton joined in demurrer; and the justice rendered judgment for the plaintiff, upon the demurrer, for \$42 60 damages, and 65 cents costs.

From this judgment, Edgerton, the defendant in the suit before the justice, regularly appealed to the court of common pleas of the county of Delaware; and that court adjudged that the rejoinder of Edgerton was a good bar to the action of Latham, and accordingly rendered a judgment in his (E.'s) favor for \$12 80, the costs of the appeal. To reverse this judgment, Latham brings his writ of error.

It has repeatedly been decided by this court, that the courts of common pleas, in cases of appeal, acquire no jurisdiction, unless the provisions of the act giving the appeal are strictly complied with. Among other things, the bond must be in double the amount of the judgment, before

the justice. (4 Cowen, 61, 82, 540. 6 id. 585, 592, 3. 7 id. 466.) The same cases show, that although the parties to such appeal join issue, and go to trial in the court of common pleas, yet the court does not, by that means, acquire jurisdiction, but is bound, even after trial, to dismiss or quash the appeal, if a motion is made for that purpose. The parties are considered as having a standing in court only by force of the appeal; and, although the subject matter of the suit be one over which the court might have had original jurisdiction, yet, having been brought there by appeal, the subsequent acts of the parties are considered as compulsory, and not as intended voluntarily to confer jurisdiction upon the court. The act creates a new mode of transferring suits originally commenced before justices of the peace to the court of common pleas. It confers a new and peculiar jurisdiction upon those courts, which vests only upon a strict compliance by the parties with all the requirements of the act.

According to these principles, the proceedings of the court of common pleas, on the original appeal, were *coram non iudice* and void; it being admitted by the pleadings that the penalty of the bond given upon that appeal was not in double the amount of the judgment before the justice. [1] That judgment was of course unaffected by the appeal, and remained in full force.

But it is said that a record cannot be impeached by pleading; that the plaintiff below should either have applied to the court of common pleas to set aside the proceedings upon the appeal, or have brought a writ of error, and alleged diminution in the bond; that having submitted to the judgment of that court, he cannot now impeach it. The plaintiff below might have applied to the court to set aside their proceedings; but he was not bound to do so. He had a right to lie by until the decision or judgment of the court was set up against him, and then to show that the proceedings were void for want of jurisdiction. The principle that a record cannot be impeached by pleading, is not ap-

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[1] The correctness of this doctrine is questioned in *Van Dusen v. Hayward*, 17 Wen. 67.

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plicable to a case like this. The want of jurisdiction is a matter that may always *be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. [1] The want of jurisdiction makes it utterly void and unavailable for any purpose. (Opinion of Thompson, Ch. J. in *Borden v. Fitch*, 15 John. 141. *Mills v. Martin*, 19 John. 38.)

The court below, therefore, erred in rendering judgment for the defendant.

Judgment reversed.

HYDE *against* STONE.

On the death of a man intestate, leaving personal property, of which one of two distributees, takes possession, he is a tenant in common with the other: and trover will not lie at the suit of the other, unless the property be sold or destroyed by the possessor. [2]

One tenant in common cannot, like a partner, sell the whole interest of his co-tenant. If he do so, trover lies by the other.

By marriage, the property in possession of the wife passes to the husband; and if her interest be that of a tenant in common, her husband becomes a tenant in common.

In trover by one tenant in common against his co-tenant, where it appeared that the defendant admitted that some of them were lost and destroyed; but did not say by himself; and they had before been in possession of his wife, by marriage with whom he acquired his interest; *held*, that it should be put to the jury whether there was a conversion by the defendant, and to what extent; and though he had before admitted that his co-tenant was entitled to a certain value, or to certain articles which he (the defendant) proposed to deliver; yet *held* that the judge had no right to direct a verdict for any certain sum; but the amount of damages should be put to the jury.

When there are facts to be passed upon, and the material evidence from which a conclusion is to be drawn is not clear and implicit, such evidence should be left to the jury.

It is not competent for a judge to direct a verdict subject to the opinion of the court, unless by consent of parties.

One tenant in common cannot bring an action merely for dispossessing him; for his right is not superior to that of the other.

TROVER; tried at the Chenango circuit in January, 1827, before NELSON, C. Judge; when a verdict was found for the plaintiff, subject to the opinion of this court

A motion was now made for a new trial, on a case, the substance of which will be found in the opinion of the court.

[1] *DeLafield v. The State of Illinois*, 2 Hill, 159. *Barber v. Winslow*, 12 Wen. 104. *Harrington v. The People*, 6 Barb. 607. *Noyes v. Butler*, *id.* 613. *Burkle v. Eckart*, 3 Denio, 279.

[2] *Hyde v. Stone*, 7 Wen. 354. *Gilbert v. Dickenson*, *id.* 449. *Farr v. Smith*, 9 *id.* 339. *White v. Osborn*, 21 *id.* 72. *Tyler v. Taylor*, 8 Barb. 585. *Oviatt v. Sage*, 7 Conn. 95. See further Dig. N. Y. Rep. by Hogan, tit. Tenants in Common.

S. Sherwood, for the plaintiff.

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J. A. Collier, contra.

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Curia, per WOODWORTH, J. This was an action of trover. The plaintiff is the only son and heir of Gershom Hyde, who died in 1801, leaving a widow and various articles of personal property. In 1808, the widow married the defendant, and died in 1809. After the marriage, the plaintiff lived with the defendant, until the death of his mother, and then departed. The plaintiff was born in September, 1800. The widow had possession of the property until her marriage, when the defendant took possession. It appeared at the trial, that in 1814, P. Humphreys, at the request of the plaintiff's guardian, called on the defendant for a settlement. The defendant agreed that he was liable to pay 80 dollars on account of the property; and would give that sum, or let the witness (H.) have any of the articles he wished. A memorandum of articles was then made, and asserted to by the defendant, valued at 95 dollars $\frac{1}{4}$. This proposition was left with Humphreys for the ratification of the plaintiff's guardian; but nothing was afterwards done. In 1824, the plaintiff made a demand of his interest in the articles. The defendant refused to give up any thing; saying that some of the articles were sold, and some destroyed. The defendant produced, at this time, some of the property nearly worn out and worth little. The residue of the articles the defendant said were destroyed or sold. The plaintiff's demand was for two-thirds of the property. The judge directed the jury to find a verdict for the plaintiff for 136 dollars, subject to the opinion of the court on a case to be made. To this direction the counsel for the defendant excepted. The jury found for the plaintiff with 136 dollars damages.

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It appears to me this form of action is not adapted to the facts before us. If the defendant had been called to account, a liquidation of the claim might have been made after all proper allowances to the defendant. As that

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remedy has not been chosen, the question is, whether the action of trover has been supported by the proof.

On the death of Gershom Hyde two thirds of the personal property vested in the plaintiff, and one third in the widow. On the marriage, her share passed to the defendant, so that the plaintiff and defendant became tenants in common of the chattels, for the recovery of the value of which this action is brought. Tenants in common of a chattel have an equal right to the possession. The law will not afford an action to the one dispossessed, because his right is not superior to that of the possessor. But tenants in common are not like partners. One of the latter may dispose of their joint chattels by virtue of an implied authority to sell, without being liable as for a tort, while the latter cannot dispose of them without violating the right of their co-tenants. For a sale, therefore, trover will lie by one tenant in common against another. (Wilson v. Reed, 3 John: 175.) As to a portion of the chattels, they remained in the defendant's hands, when the demand was made; and they were produced. As to them, the action would not lie. But the defendant said some of the articles were sold and some destroyed. By whom sold or destroyed was not stated. The widow had possession from 1801 to 1808, the time of her marriage. Whether sold and destroyed before her marriage, or subsequently by the defendant, and if sold and destroyed, what portion of them, does not clearly appear. These were questions proper to be submitted to the jury. They were exclusively within their province. To what extent, if at all, could the defendant be made liable? Upon what ground the judge directed the jury to find a specific sum, when the question of damages was involved in uncertainty, I have not been able to discover. The defendant claimed the right of going to the jury, and excepted to the direction. It seems to me the judge erred in disposing of the cause in this manner, when there were facts to be passed on, and the material evidence from which a conclusion is to be drawn was not clear and explicit. It is not competent for the

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judge to direct a verdict subject to the opinion of this court, unless by consent of parties.

The verdict must be set aside, and a new trial granted, with costs to abide the event.

Rule accordingly.

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*JACKSON, *ex dem.* HILLS, against TUTTLE.

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EJECTMENT for 36 acres of land, in the town of Vernon, in the county of Oneida; tried at the circuit in that county, on the 3d of October, 1826, before WILLIAMS, C. Judge.

A short form of entering a judgment in a justice's court, for the purpose of being transcribed and docketed, so as to bind lands.

At the trial, the plaintiff offered in evidence the exem-

The transcript exemplified in *prima facie* evidence of the regular rendition of the judgment, without any other proof; and also that the justice had jurisdiction. [1]

A deputy sheriff may complete a sale and execute a deed in the name of his principal, after the latter goes out of office, if a levy was made before. [2]

A judgment for the plaintiff in ejectment, generally terminates all presumption in favor of the defendant's title, arising from prior possession.

A defendant in ejectment can not, in general, transfer his possession so as to defeat execution in the ejectment suit: nor would a sale of his right on judgment and execution protect the purchaser in his possession.

But otherwise, where a judgment in ejectment is obtained by *cognovit*, after a judgment at the suit of a creditor is docketed against the defendant in ejectment, under which his right is sold. In such case, the purchaser may hold or recover possession against the plaintiff in the ejectment, on the defendant's prior possession; and this, even though the *cognovit* be given in pursuance of the award of arbitrators.

Though one has recovered in an ejectment, yet the recovery is not conclusive upon the defendant or those claiming under him. And accordingly, where, after a recovery in ejectment, the defendant's title was sold on judgment and execution and the purchaser brought ejectment against the former recoverer in possession, who set up a mortgage against the former defendant, which proved to be usurious and therefore void, *held*, that the purchaser should recover.

• One setting up and claiming under a mortgage, admits the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious, shows that such title was not affected by it.

Whether a sheriff can sell lands of a defendant, holden adversely to him when the judgment is obtained? *Quere*.

Lands in a defendant's possession when judgment is obtained against him, may be sold by execution, though at the time of the sale they are holden adversely to him. [3]

One in possession of land has an interest in it which is bound by a judgment, though the title be in another.

[1] R. S. 4th ed. 328, § 12, 13. See also *People v. Fisher*, 24 Wen. 215. *Jackson v. Jones*, ante 191 n. 2.

[2] S. C. 6 Wen. 213, 224.

[3] But see *Jackson v. Post*, ante 128, n. 1, and authorities there cited.

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plification, from the Oneida clerk's office, of the transcript of a judgment before a justice of Oneida, in these words

"ONEIDA COUNTY,
Justice Court,

Jesse Hills

v.

Daniel Gridley.

} March, 24, 1820.

} Judgment rendered for plff. for

the sum of . . . \$49 64

Costs, . . . 1 18

Costs of copy to be added. \$50 82

I certify the above to be a true copy of a judgment on record in my office. Dated April 3d, 1820.

SAMUEL WETMORE, Just. of Peace."

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*The defendant objected that the exemplification was not competent evidence; that such a transcript was not a record or paper that could be proved by exemplification. The objection was overruled, and the defendant excepted.

The plaintiff then gave in evidence the exemplification of the docket of the judgment, which was thus :

" Jesse Hills	}	Damages.	Costs.	Whole amount.	When filed.
v.		\$49 64.	1 18.	50 82.	Apr. 4, 1820
Daniel Gridley.					

Name of justice.	When Ex. issued.	When returned.
Samuel Wetmore.	4 April, 1820.	July 15.
Alias execution, 15 July."		Nulla bona.

The other facts, material to the case, will be found in the opinion of the court.

C. G. Bronson, for the defendant.

J. A. Spencer, contra.

Curia, per SUTHERLAND, J. The lessor of the plaintiff claimed title to the premises in question, under a judgment in his favor against one Daniel Gridley, obtained before a justice of the peace, on the 24th of March, 1820. A tran

script of the judgment was filed in the county clerk's office, and the judgment duly docketed on the 4th of April, 1820. An execution was issued on the same day, and returned *nulla bona*, on the 15th of July. On that day an *alias* execution was issued, and was delivered to David Pierson, the deputy sheriff, on the 18th of the same month. He immediately levied upon the premises in question, then in the possession of Gridley, the defendant in the execution, and on the 13th of October following, sold them by virtue of the execution, to the lessor of the plaintiff. The certificate of sale was duly filed; and on the 16th of January, 1822, a deed was given to the lessor in the name of John B. Pease, as late sheriff of Oneida county; but executed by David Pierson, the deputy, to whom the execution had been delivered as deputy, to the then late sheriff. This deed was duly executed by Pierson, and recorded in the clerk's office of Oneida county, on the 17th of December, 1822.

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*The defendant objected to the preceding evidence:

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1. On the ground that the plaintiff had not proved that any judgment had ever been recovered by the lessor of the plaintiff against Daniel Gridley; and he contended that the transcript of the judgment filed in the clerk's office, was not competent evidence of the judgment itself; but that the plaintiff was bound to prove by other evidence, that the judgment had in fact been rendered before the justice, and that he had jurisdiction in the premises; that the transcript was a mere authority to the clerk to enter or docket the judgment, and did not supersede the necessity of proving the judgment in the same manner as other judgments before justices of the peace are proved. He also contended that the transcript was not a record, and could not be proved by an exemplification.

These objections were overruled and the defendant proceeded to his defence; and gave in evidence, 1. An exemplification of a judgment record in ejectment in favor of the defendant Tuttle against Daniel Gridley, for the recovery of the premises in question. The *placita* and memorandum of the record were of August term, 1818:

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and the judgment was perfected upon a *relicta* and *cognovit*, signed by Theodore Sill, the attorney for Gridley, on the 12th of August, 1820.

He also gave in evidence an exemplification of a writ of possession issued upon the judgment, tested the 7th day of August, 1820, and returnable the then next October term, with an endorsement by the deputy sheriff, that he had delivered the premises in question to Tuttle. It was admitted that the possession was so changed under the writ, in August, 1820.

The defendant then proved an arbitration bond between Gridley and himself, dated the 31st of May, 1820, submitting all matters in difference between them to certain arbitrators named therein; and also an award of the arbitrators made in pursuance of the submission, and bearing date the 14th of July, 1820, by which among other things, they directed that Gridley should deliver up to Tuttle the premises in question, then in his possession, on or before the first Monday in August then next; and that the ejectment suit before mentioned should remain as a security for that purpose; "and that if Gridley did not deliver up the possession by the day before mentioned, then that he or his attorney should immediately after that day give a confession of judgment in that suit, to enable Tuttle to obtain the possession.

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Theodore Sill, the attorney for Gridley in the ejectment suit, and also before the arbitrators, testified that the ejectment suit was once tried, before the differences between Gridley and Tuttle were referred to arbitration; that the verdict which was then rendered was set aside by the supreme court. That the proceedings between the parties were hostile throughout. That Tuttle then claimed title to the premises in question, under a mortgage executed by Gridley to him; and the point in dispute between them was whether that mortgage was usurious or not. That he gave the *cognovit* in obedience to the directions of the award having previously agreed to do so, in the event of an award in favor of Tuttle.

The counsel for the defendant, upon this evidence,

insisted, first, that the entry of Tuttle under the ejectment suit and the award, destroyed the presumption of a title in Gridley, arising from his having been in possession when the judgment of the lessor (Hills) was recovered against him; and that it was incumbent on the plaintiff to give other evidence of a title to, or interest in the premises in question, in Gridley, than the mere fact of his possession; secondly, that it was not shown that Gridley ever had any interest in the premises, which could be bound by a judgment; and thirdly, that the sheriff's sale and deed, under which the plaintiff claimed, having been made and given while Tuttle was in possession, holding in hostility to Gridley, and all others, were inoperative and void. The court, however, ruled, that upon the evidence as it stood, the plaintiff was entitled to recover.

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The defendant then gave in evidence a deed from Gridley and wife to him, for the premises in question, bearing date the 1st of April, 1817, which was acknowledged the 11th of June, 1817; but it was not recorded. The consideration expressed was \$1000. The court ruled that this deed, not having been recorded, was inoperative and void as against Hills the lessor, whose deed from the sheriff was recorded, unless "notice of the deed to the defendant could be brought home to him, at or before the sheriff's sale, which was not attempted.

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The defendant then gave in evidence a mortgage from Gridley to him, upon the premises in question; dated September 12th, 1815, for securing the sum of \$775 35. This mortgage was duly acknowledged and registered. It was also duly foreclosed under the statute, and, upon such foreclosure, the defendant became the purchaser of the mortgaged premises on the 18th of February, 1818.

The plaintiff alleged that the mortgage was usurious. The question of usury was submitted by the judge to the jury upon the evidence given by the parties.

The plaintiff then proved, (the defendant objecting to the competency and relevancy of the evidence,) that the defendant had recognized the judgment under which he claimed, and had requested him to sell Gridley's property

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under it, and had agreed to purchase the premises in question under it, at the amount of the judgment, in order to establish his title, but, upon the day of sale, refused to perform his agreement.

The defendant then gave some evidence as to the delivery of the deed of April, 1817, which it is not material to state, as the judge ruled, that if the deed was then delivered, it was inoperative against the plaintiff, inasmuch as it had not been recorded.

The judge charged the jury that the plaintiff was entitled to their verdict, unless they should find that the mortgage from Gridley to Tuttle was free from usury; and he submitted that question to them upon the evidence. They found for the plaintiff.

The principal questions presented by this case, are,

1. Whether the justice's judgment, under which the plaintiff claims, was proved by competent evidence;

2. Whether the deed from the then late sheriff to the plaintiff was well executed by his deputy;

3. Whether the presumption of title in Gridley, the defendant in the judgment of the lessor of the plaintiff, arising from Gridley's possession at the time when the judgment was obtained, and execution issued, was destroyed, or the plaintiff's rights affected, by the entry of Tuttle, under his judgment and execution in ejectment, prior to the day of sale, under the judgment of the lessor of the plaintiff;

4. Whether the premises in question were held adversely when the sheriff's deed to Hills was given, so as to affect its validity.

1. In Jackson ex dem. Witherell and Hyde, v. Jones, (a) argued in August term, 1827, the question was presented as to the proper manner of proving a judgment rendered by a justice of the peace, a transcript of which had been certified by the justice and filed or recorded in the county clerk's office, under the statute. The court had come to the conclusion, before the argument in this cause, that an

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exemplification of the transcript filed in the clerk's office was competent, and, *prima facie*, sufficient evidence of the rendition of the judgment; and an opinion to this effect had been prepared in that case; but, as the judgment was not entered, we thought proper to suspend it for further consideration, as the question was very ably discussed by the counsel in this cause. Our conclusion, however, remains unchanged.

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The question is by no means free from difficulty; but we think the legislature, when they made provisions for rendering justice's judgments a lien upon land, under which it may be sold, and the title transferred to the purchaser, must have intended that the document filed in the clerk's office, and upon the filing of which the judgment is to be entered or docketed, should be a substitute for an ordinary judgment record.

There would be no safety in purchasing real estate under such a judgment, if the purchaser, at any period however remote, whenever his title was questioned, were obliged to produce the magistrate before whom the judgment was obtained, together with his docket, in order to establish the fact of a judgment having been obtained. How is the fact to be made out, if the magistrate dies, and his docket cannot be found, or he removes away, and carries his books with him?

The transcript, it is conceded, is an authority to the clerk to issue an execution. It must, therefore be evidence of a judgment having been rendered; for nothing but a judgment can warrant an execution. If evidence of a judgment for that purpose, why should it not be for the purpose of sustaining a title acquired by the purchaser under the execution thus issued?

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It is true the act does not require that the certificate or transcript of the justice should be sworn to by him, or be authenticated by any collateral evidence; and that there is, therefore, room for abuse in the exercise of his authority. The act undoubtedly might have been better guarded; but we think there is less danger in the construction which we give to it, than in that for which the counsel for the defend-

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ant contends; and it is for the legislature, not the court, to provide against the dangers which are suggested.

2. In Jackson ex dem. Scofield, v. Collins, (3 Cowen, 89,) it was held that a deputy sheriff may complete an execution by sale and conveyance, after the sheriff goes out of office, provided the execution was levied before. This disposes of the second point.

3. The plaintiff's judgment, it will be recollected, was docketed the 4th of April, 1820, and his execution levied on the 18th of July following; Gridley, the defendant in the judgment, being then in possession.

On the 29th of August, Gridley gives a *relicta* and *cognovit* in an action of ejectment brought for these premises by Tuttle, the defendant. That *cognovit* is given in obedience to an award of arbitrators. The arbitration bond bears date the 31st of May, 1820, nearly two months after the plaintiff's judgment; and, under the judgment in ejectment so confessed, Tuttle, in the latter part of August, 1820, obtains the possession of the premises; and the sale on the plaintiff's execution took place on the 18th of October following. The question is, whether, under these circumstances, the plaintiff was bound to give any other evidence of Gridley's title to, or interest in the premises, than the fact of his being in possession when the judgment was rendered, and of his having been so for a long time before.

If the judgment in ejectment had been obtained in the regular course of litigation, I should have entertained no doubt that it would have terminated all presumptions in favor of Gridley's title, arising from his possession prior to that time. That ejectment suit was commenced in 1818; and if Hills, the present lessor, had obtained possession of the premises under a sale upon his judgment, he might have been turned out of possession by Tuttle, by virtue of his recovery in ejectment. A judgment in ejectment authorises the plaintiff to take possession of the premises, whoever may be in possession of them. The defendant in an ejectment suit cannot defeat the action by transferring the possession to another, either with or without consideration. Whoever succeeds to his possession, succeeds also to the perils of the suit.

But in this case the judgment in ejectment was not obtained upon a trial or upon a default; but upon a *cognovit* given in pursuance of the award of arbitrators. It stands, then, precisely as though there had been no suit in ejectment, but the parties had submitted their differences in relation to these premises to arbitrators, and the possession had been delivered up by Gridley in consequence of their award. Arbitrators, we well know, proceed upon equitable, not strictly legal principles, in their adjudications; and I apprehend that a change of possession, in obedience to an award, cannot, as against a third person, situated as the lessor of the plaintiff in this case is, impose upon him the necessity of showing any other evidence of title in the defendant in his judgment and execution, than his possession when the judgment was obtained.

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But admitting that the judgment in ejectment in this case is to be considered as a hostile and legal judgment, it appears from the testimony of Mr. Sill, that Tuttle claimed title to the premises in question in that suit, under a mortgage given by Gridley to him; and that the only point in dispute was, whether the mortgage was usurious or not. This was undoubtedly the same mortgage which the defendant has given in evidence in this case, and which the jury have found to be usurious.

The defendant, by exhibiting the mortgage, admits Gridley's title at that time; and the plaintiff, by showing that mortgage to have been usurious, shows that Gridley's title was not affected by it.

*4. If these views are correct, then the defendant, though he was in possession when the sale took place under the execution of Hills, stood precisely in Gridley's place, and there is no pretence of his possession being adverse, so as to affect the deed of the sheriff to Hills, admitting the principle, that land held adversely is incapable of grant to apply to judicial sales and conveyances. [1]

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[1] This decision was reversed on error. See S. C. 6 Wen. 213. See also *Parks v. Jackson*, 11 id. 242. See also *Jackson v. Post*, 15 Wen. 688. *Hooker v. Pierce*, 2 Hill, 650. See *Jackson v. Post*, ante 125, & 1.

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The deed from Gridley to Tuttle was properly rejected. Tuttle never was in possession under it. Gridley remained in possession until 1820 ; and Tuttle, by receiving the deed from the arbitrators as a part of their award, seems to have admitted that it had not previously been delivered. But at all events Gridley, remaining in possession, had an interest in the land, which was barred by the lessors' judgment, and was capable of being sold under it.

Motion for new trial denied.

JACKSON, *ex dem.* Bratt and others *against* TIBBITS.

Though a deed containing operative words both of a partition and an original deed, may be good as a partition [*242]

deed merely, the interests of the parties

appearing, in fact, or on the face of the deed, to be a common interest, and the deed being confined to that ; yet, if this be not so, it will pass the interest of the several grantors, as an original deed, provided they have any such interest as may be covered by the words describing the subject matter.

A deed must receive its construction, as to what it shall convey, from its language and subject matter.

The statute of March 16th, 1785, (1 Jones & Varick, 201,) providing for the partition of patented and other lands, is confined in its operation to joint or common owners of equal shares ; and if a partition be made where the shares are unequal, it is void. [1]

A partition under that act must designate the parties, who are to take in severalty, by name, or with as much certainty as a deed of conveyance ; and where the commissioners awarded in severalty thus : to B's representatives, without naming them ; *held*, that the partition was void for uncertainty of the persons who were to take.

One tenant in common entering on, or being in possession of lands generally, shall be presumed to have entered, or taken and possessed, consistently with the common title of all ; and in such case, though the possession be exclusive, the statute of limitations will not run against his co-tenant ; but where, by some notorious act, he claims an exclusive right, though it be under a title which is void, yet the statute shall run from the time of such claim.

Thus, where a tenant in common caused a partition to be made, professing to be under the act of 1785, (1 Jones & Varick, 201) which was void in law, yet he having possessed in severalty under the partition for 20 years, *held*, that a co-tenant was barred his right of entry.

[1] Nor was this act obligatory on one who at the time was a *femme covert*, and was not made a party to the proceedings, although they were had on the application of her husband *Zimmerman v. Rapp*, 20 Wen. 100. See also Dig. N. Y. Rep. by Hogan, tit. Partition.

At the Rensselaer circuit, before Duer, C. Judge, the jury found a special verdict as follows :

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That as to 812 $\frac{1}{4}$ of the *locus in quo* the whole into 829 parts to be divided, the defendant was *not guilty*.

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As to the residue, being 17 $\frac{1}{4}$ of the *locus in quo*, the jury found the grant of the Hosick patent, June 2d, 1688, to Maria Van Rensselaer, Hendrick Van Ness, Jacobus Van Cortlandt and Gerrit Teunise ; that Van Rensselaer and Teunise dying, whereby, upon the doctrine of joint tenancy, the whole survived to the other two patentees, they (Van Ness and Van Cortlandt) the two survivors, conveyed one fourth of the patent to Johannes Van Vechten, the heir of Teunise, by indenture, bearing date October 18th, 1706.

The rights of the parties to this suit were involved in the history of Johannes Van Vechten's fourth part, in relation to which the jury found substantially the following facts : Of this 4th part, he (Van Vechten) conveyed (June 10th, 1707) the right half (then yet undivided) to Jonas Douw ; and on the 30th, of October, 1741, he, (Van Vechten) conveyed the residue to Hendrick Bries, Barent Van Bure, jun. and Barnardus Bratt, jun. May 27th, 1754, by partition and deed of that date, pursuant to a survey of John R. Bleecker, this 4th part was allotted in severalty to Van Vechten's grantees, as lots 18, 20, 21, 29, 57, 60, 54, 51, 48, 45, 38 and 42, called original lots. Previous to this, January 20th, 1753, Van Bure had conveyed his interest to Bratt and Bries, his co-tenants ; and on the 22d, two days after, they conveyed the same interest to Edward Collins. Bries died in 1754, and Van Bure in 1777, Barnardus Bratt surviving, and taking Bries' interest by survivorship as joint tenant. On the 4th of October, 1786, Barnardus Bratt conveyed his share derived from Bries to his (B. B.'s) son, Daniel Bratt, who, on the same day, conveyed one undivided half of this Bries' share to Thomas L. Witbeck. December, 15th, 1787, a bill in chancery was filed by Dirck Van Vechten, Volkert Van Vechten and others against Catharine Bratt, and Hendrick and the other children of Barnardus Bratt, and Witbeck ; and March 22d, 1797, one half of all the land derived by the defendants in

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the bill from *Barnardus Bratt and Hendrick Bries, or either of them, were decreed by the court of errors to the complainants, and were afterwards conveyed to them accordingly.

Jonas Douw died seised of his one half, (which he derived from Johannes Van Vechten,) before the statutes of descents, leaving Peter Douw, his eldest son and heir, who also died before the statute of descents, leaving two sons, Volkert P. Douw the eldest, and Abraham Douw his second son. The latter died previous to January 13th, 1790, leaving 4 children his heirs at law.

Collins died previous to March 27th, 1787, without issue, leaving John C. Holland his collateral heir. This Holland, by 3 several conveyances of different parts, dated January 17th, 1783, March 27th, 1787, and September 4th, 1787, passed all his interest to Thomas L. Witbeck, viz. the Van Bure share.

In 1789, Barnadus Bratt died seised of all his share which he purchased of Johannes Van Vechten, leaving Daniel Bratt, John B. Bratt, Gerrit Teunise Bratt, Hendrick Bratt, Elizabeth, wife of John L. Bratt, and Mary, wife of Thomas Lotteridge, his children and heirs at law.

On the 13th of January, 1790, by indenture, between Volkert P. Douw and the four children of his deceased brother Abraham, of the one part, and the heirs of Barnardus Bratt, with Witbeck, of the other part, the Douws conveyed all their interest to the Bratts and Witbeck, reserving lot No. 48, lot No. 38, except 365 acres, 440 acres of lot No. 42, and 309 acres of lot No. 54. The parts so reserved were, by the same indenture, conveyed by Witbeck and the Bratts to the Douws. On the 29th day of October, 1790, Witbeck conveyed to the Bratts all his (W.'s.) interest derived from the Douws.

In July term, 1798, James Caldwell recovered a judgment in this court against Witbeck, which was docketed August 26th, 1798, under a *fi. fa.* upon which the sheriff of Rensselaer, on the 16th of April, 1800, sold to George Tibbits, the defendant in this cause, all Witbeck's interest in the *original* lots above mentioned. The sheriff's deed was executed

August 19th, 1800; and about this time Peter S. Schuyler, James Van Ingen and Harman P. Schuyler were appointed commissioners under the act of March 16th, 1785, (1 Jones & Varick, 201,) to partition the *original lots*. They caused them to be surveyed, ascertaining and specifying the contents of each original lot; which were mentioned particularly in the special verdict. (α) This survey was completed and a copy of the commissioners' proceedings was filed with the secretary of state and another with the clerk of Rensselaer county, on the 7th August, 1800. The commissioners ascertained that the aggregate amount of the original lots was 14,478 acres. This partition was acted upon and carried into effect by several of the parties in interest, but never by Hendrick Bratt or his heirs, the lessors of the plaintiff. On the 24th of November, 1800, the Bratts, except Hendrick, joined with others in a partition deed of the premises surveyed and partitioned as last mentioned, between them and Tibbits, the now defendant, (according to that survey,) and conveyed their interest to Tibbits. The premises in question, (the half of lot 2, in the 7th allotment,) fell, by the partition of Van Ingen and Schuyler, to the Van Bure share. The possession of the defendant, by himself or tenant, of lot No. 2, commenced in 1800, when Jacob L. Viele took an agreement from Tibbits (the defendant) for a deed. On the 6th of October, 1803, Viele took the deed from the defendant and John D. Dickenson, for one half of the lot, the premises in question; and this suit was commenced February 23d, 1825, Tibbits having, by consent, been substituted as defendant, instead of Viele.

Hendrick Bratt died March 28th, 1823, leaving the lessors of the plaintiff his children and heirs at law, to whom his right in the patent descended. But whether: &c.

(α) The quantities were as follows:

Lots.	Acres.	Lots.	Acres.	Lots.	Acres.
21	930	57	832	48	1498
20	707	60	580	45	1534
18	812	50	1142	38	1585
29	284	51	1115	42	1694

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Farther facts will be found stated in the opinion of the court.

J. V. Henry now moved for judgment upon the special verdict in favor of the plaintiff.

*He stated the following points :

1. That the lessors of the plaintiff have shown title in themselves to 17 parts and $\frac{1}{111}$ of a part of the premises in question.

2. That the proceedings of Peter S. Scuyler, James Van Ingen, and Harmanus P. Scuyler, under the act entitled "An act for the partition of lands," passed the 16th of March, 1785, to divide the lots No. 18, 20, 21, 29, 57, 60, 54, 51, 48, 45, 38 and 42 in the Hosick patent, are of no effect as against the lessors of the plaintiff :

3. That the right of entry of the lessors of the plaintiff, is not affected or tolled by lapse of time.

He furnished a statement in writing to the court, deducing the plaintiff's claim as follows :

The quantity to be recovered stands thus from the special verdict :

	Acre.	Rod.	Perches.
The contents of the Gerrit Teunise lots by the commissioner's survey, are	14,478	0	00
Deduct $\frac{1}{4}$ conveyed to Jonas Douw,	7,239	0	00
Deduct Van Bure's share conveyed to Collins, and vested in Witbeck's, $\frac{1}{4}$	2,413	0	00
	4,826	0	00
$\frac{1}{4}$ decreed to the Van Vechtens,	2,413	0	00
	2,413	0	00
Deduct $\frac{1}{4}$ of $\frac{1}{4}$, Witbeck's part of Bries' share,	1,206	2	00
Left for Barnardus Bratt's representatives,	1	206	2 00
Conveyance between the representatives of Douw, and Thomas L. Witbeck, and the Bratts ; and from Witbeck to the latter.			
The representatives of Douw got under the			

	Aces.	Roods.	Furths.	UTICA, August, 1828.
first mentioned conveyance, according to the commissioner's survey, lot No. 48,	1,498	0	00	Jackson v. Tibbits.
Lot No. 38, except 365 acres,	1,220	0	00	
In lot No. 42,	440	0	00	
In lot No. 54,	309	0	00	
	3,467	0	00	
* $\frac{1}{4}$ of share conveyed by Johannes Van Vech- ten to Jonas Douw, as above,	7,239	0	00	[*246]
Deduct what was conveyed by Witbeck and the Bratts to the representatives of Douw,	3,467	0	00	
Gave to Witbeck and the Bratts, under the conveyance from the representatives of Douw to them, and released by Witbeck to the Bratts,	3,772	0	00	
According to the contents of the lots under the commissioner's survey as above, the share of Barnardus Bratt's representa- tives was as above,	1,206	2	00	
	4,978	2	00	
$\frac{1}{4}$ to lessors, as heirs of Hendrick or of Bar- nardus Bratt,	829	3	00	

829

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J. P. Cushman & A. Van Vechten, contra, relied on the following points :

1. That upon a special verdict, it is the province of the court to determine the effect and operation of deeds and written instruments thereon found to have been executed, without regard to the finding of the jury as to those parti-

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culars; and for that purpose the special verdict regularly must set forth such deeds and instruments *in hæc verba* that the court may judge of the whole contents;

2. That the lessors' title as heirs of their father Hendrick Bratt, deceased, one of the six heirs at law of Barnardus Bratt, deceased, extends only to $\frac{1}{3}$ of such part of the premises in question, as the legal representatives of Barnardus Bratt are entitled to;

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3. That the right of Barnardus Bratt's representatives is limited to the lands which they derived title to, under Gerit Teunise, through the deed of Johannes Van Vechten, of 1741, to Barnardus Bratt, Hendrick Bries, and Barent Van Bure;

4. That the deed of January, 1790, between Volkert P. Douw and others, the representatives of Petrus Douw of the one part, and the representatives of Barnardus Bratt and Thomas L. Witbeck of the other part, appears on its face and by its terms to be a mere partition deed of the common interests of the parties thereto, claimed under the deed of 1741, and defines the extent of those interests, and therefore its legal operation is to sever the common interests thus defined, so far as relates to the grantors and grantees;

5. That the deed of October, 1790, from Thomas L. Witbeck to the Bratts, operated only to extinguish any separate interest which the grantor might have acquired from any of the Douws therein named, which is not thereby excepted; but as no such interest appears by the special verdict, it would seem that it was given by Witbeck, and accepted by the Bratts merely for greater caution; *valeat quantum valere*;

6. That the deeds set forth in the special verdict show that the share of Van Bure under the deed of 1741, was sold and conveyed by him to his co-grantee, Bratt and Bries, who sold and conveyed the same to Edward Collins, from whom the title passed to Thomas L. Witbeck, and from him by sheriff's sale to the defendant, and that Barnardus Bratt took the share of Bries under the same deed by survivorship, and conveyed the same to his son, Daniel Bratt, who

sold and conveyed the half to Witbeck, which has also passed from Witbeck to the defendant ;

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7. That the decree in the court of errors, and the release in obedience to it, show that the one moiety of what then remained to the representatives of Barnardus Bratt, under the deed of 1741, by title derived through Hendrick Bries and Barnardus Bratt, passed to the Van Vechtens, and thus the share of the representatives of Barnardus Bratt, (except his son Daniel, to whom he had conveyed the Bries share,) was reduced to one moiety of one-third of Garret Teunise's quarter of the patent, after deducting the 3532 acres, released in severalty to the Douws by the Bratts and Witbeck, by the partition deed of January, 1790 ;

*8. That the premises in question in this suit are the westerly half of lot No. 2. in the 7th allotment ; the whole of which lot, by the partition of 1800, fell to the share of the representatives of Barent Van Bure, whose one-third part, under the deed of 1741, Barnardus Bratt and Hendrick Bries sold and conveyed to Edward Collins ;

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9. That the premises in question have been held in adverse possession by the defendant, or Jacob L. Viele under him, since 1800, and of course more than 24 years before this suit was commenced.

They delivered to the court a written statement deducing the defendant's title as follows :

Gerrit Teunise's one-quarter of the patent, according to the commissioners' survey, contained	Acres. 14,478
Deduct what was released to the Douws by the partition deed of January, 1790, which defined the extent of their claim to be	3,467
Which leaves to the representatives of B. Bratt, H. Bries and B. Van Bure,	11,011
Deduct $\frac{1}{3}$ for the share of Van Bure which was conveyed to B. Bratt and Hendrick Bries, who sold and conveyed it to Edward Collins, from whom it descended to John C. Holland, who sold and conveyed it to Thomas L. Witbeck, from whom it passed, by the sheriff's sale, to the defendant, George Tibbits,	3,670 $\frac{1}{2}$

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Which leaves to the representatives of B. Bratt, and
H. Bries, 7,340½
Deduct ½ for the share of H. Bries, which vested in
B. Bratt by survivorship, who conveyed the same
to his son Daniel Bratt, and Daniel Bratt sold ½
thereof to Thomas L. Witbeck, from whom it
passed by the sheriff's sale to the defendant,
George Tibbits, 3,670½
Which leaves to the representatives of B. Bratt, 3,670½
Deduct ½ conveyed to the Van Vechtens under the
decree of the court of chancery, 1835½
Which leaves to the heirs at law of B. Bratt, 1835½
[*249] •Deduct ¼ for the shares of the 5 heirs of B. Bratt,
who conveyed the same to George Tibbits, 1525½
Which leaves for the children of Hendrick Bratt,
deceased, (the lessors of the plaintiff,) as their
proportion in the whole patent, to be taken out
of the lots which in the partition were allotted to
the representatives of B. Bratt, and not out of the
premises in question, which were allotted to the
representatives of Barent Van Bure, 309½

Curia, per WOODWORTH, J. The deed of January 13th, 1790, the partition by Van Ingen and the Schuylers, and the adverse possession by the defendant, form the subjects of consideration in disposing of this cause.

1. The deed of January 13th, 1790, was between the heirs or descendants of Joseph Duow of the first part, and the heirs of Barnardus Bratt, with Thomas L. Witbeck, of the second part. By that deed, the Douws conveyed all their interest in the patent to Bratts and Witbeck, except 3467 acres, which it is agreed they reserved. What was the interest of the Douws? We must take the answer from the special verdict. It was Jonas Douw's share; or in other words, it was one half of the Van Vechten share of the patent, 7239 acres, equal to the whole quantity which Van Vechten afterwards conveyed to three: Bratt, Bries and Van Bure. Nothing appears of Jonas Douw or his descendants ever parting with any of their interest, till the

execution of the deed in question. That deed was, no doubt, sufficient to carry all the interest of the Douws in the land not reserved by it. The unreserved lands amounted to 3772 acres, then undivided. This portion, followed as the deed of January, 1790, was by the conveyance from Witbeck to the Bratts of October, 29th 1790, became wholly vested in the latter.

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It was contended by the counsel for the defendant, that this deed was but a partition of the common interest of the parties, which they derived from Jonas Douw on the one hand, and Barnardus Bratt on the other. The inference is drawn from its purporting to be a mere partition deed, and other circumstances which perhaps give some plausibility to the ground taken. But the proportions of ownership between the parties are not stated by the deed; whereas they are found by the verdict to be sufficiently large in the Douws, for giving what it is now claimed passed to the Bratts and Witbeck. The quantity conveyed depends on the share owned by the Douws at the time. The deed may have been, as supposed, a mere partition of Barnardus Bratt's and Jonas Douw's shares; but till this is shown, either upon the face of the deed, or by the rights of the parties at the time, the supposition cannot be sanctioned. Such a course would be to abandon the case made out by the special verdict, and to overturn facts by conjecture. Though good as a partition, there cannot be a doubt that the deed is equally available as an original conveyance. It must receive its legal construction and operation, according to its language and subject matter. These are the only controlling circumstances before the court.

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The Douws grant, bargain, sell, alien, release and confirm to the Bratts and Witbeck in fee, after a specific reservation, and upon a pecuniary consideration expressed, all the right, title, &c., of the former to the lands, &c. in Hosick patent. Here are the consideration to raise the use, the operative words, and a subject matter for a bargain and sale, or lease and release.

2. The partition upon which the defendant relies, professes to be made in pursuance of the act for partition of

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lands, passed March 16th, 1785, (1 Jones & Varick, 201.) This act provided that the proprietor of undivided lands inclined to make partition, might give notice in a newspaper, that three commissioners were appointed for the purpose. No objection being made, they became commissioners of course. Objections were to be heard and decided by a judge. When the commission was filled, its members were to give another newspaper notice of the time and place, when and where they would proceed to partition. When they had ascertained who and how many were the patentees, or persons claiming equal undivided shares, they were to divide the land into as many allotments as they should think best; and each allotment into as many lots as there were patentees or other owners claiming equal shares. The commissioners were then to prepare and conduct a balloting or drawing, which was to be so managed, that at least one lot in each allotment should be drawn to some one of the proprietors; that is to say, each proprietor was to have, as nearly as might be, upon the plan of dividing and drawing proposed, a share of the allotments equal to each of the other proprietors. The lots thus drawn became the several property of the person to whom they fell. By the 5th section, subdivisions of patents, or smaller tracts lying in common, might be divided in the same manner. The 6th section provided for equalizing improvements made while the land lay in common, by a pecuniary compensation. By the 7th section, if lots should happen under the 5th to be drawn to one or more having no title, such lots were still to remain in common. These are all the provisions of that statute which it is necessary to consider with a view to the questions raised upon it.

In the case before the court, the partition was thus: "To Barnardus Bratt's representatives," (without naming them) "lot No. 1 in the first allotment, containing 82 acres, &c.;" and in the same form to Hendrick Bries' and Barent Van Bure's representatives; thus treating the representatives of each as common owners of equal shares.

The statute has no application, except to existing owners of equal shares. The manner of distribution and division

could hardly fail to work the most palpable injustice as to any other rights. The land in question was owned in very unequal proportions, among the defendant, the Bratts, the Douws, Van Vechtens, &c. It is not possible to satisfy these various claims by a distribution in severalty, upon the plan followed by the commissioners. It could not be done short of several divisions and subdivisions. The commissioners proceeded as if the whole fourth of the patent had been originally granted to Bratt, Bries and Van Bure; and belonged at the time to their respective families by descent; whereas the only portion claimed in that way, was the twelfth, in the family of the Bratts. The object of all our partition acts is to give to the actual subsisting owner, in severalty, what he before held in common. The statute conferred on the commissioners a "naked power, which must be strictly construed and closely followed. In a special manner, this rule should not be relaxed, when the power is exercised by the nominees of a party in interest, whose appointment may never be heard of by the co-tenants, till their rights are divested. This partition was clearly void, as not exercised upon a proper subject matter; upon equal shares.

Again, if there was a subject matter, if here were those equal rights contemplated by the statute, who can be received as owners in severalty under such a partition? Who are we to understand by the representatives of Bratt, Bries and Van Bure? The statute intended the proceeding as a substitute for a deed of partition. Who would take under a deed giving such a designation to the parties? It cannot be doubted that the law requires quite as great a degree of certainty in this summary *ex parte* proceeding, as it would demand from a deed of the parties. The word, *representatives*, has no technical meaning in the law. It may signify heirs or executors, or *representative* may mean one who is substituted for another in any business: but the word never signifies a grantee. It cannot, most certainly, be applied to any of the proprietors at the time of the partition, except the Bratts; and to reach them we must add the epithet *real*, to distinguish them from Barnardus Bratt's

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executors. The partition is void for uncertainty of persons.

This view of the case entitles the lessors of the plaintiff to 17 $\frac{1}{4}$ of the premises in question, unless their claim is barred by the statute of limitations.

3. The defendant has shown a clear adverse possession for 21 to 25 years before suit; a possession which would certainly toll the entry of all the world, except the lessors of the plaintiff, or other tenants in common with the defendant. But full possession by one tenant in common for many years, will not *per se*, constitute an adverse possession within the statute of limitations.[1] No case goes the length of tolling an entry by such a circumstance, within the short period of 25 years.[2] (Vide 6 Cowen, 633, 4.) This is on the presumption that the possession of one is in support of the common title of all.[3] (*ibid.*) But it is equally clear, both upon the English cases and our own, that this presumption may be repelled, and an adverse possession established, by proof of an open claim of exclusive right.[4] A refusal to account or a denial of title, on demand by the co-tenant, is an ouster. (*ibid.*) And in *Jackson v. Brink*, (5 Cowen, 482,) a purchase by one tenant in common of another's share at sheriff's sale, though the sheriff's deed was void of uncertainty, was holden an ouster. The cases cited from *Wheaton*, in *Jackson v. Brink*, go farther to illustrate and establish this doctrine.

What then, in this view, is the case before the court? Up to 1800, the period of the partition, the defendant was confessedly a tenant in common. The partition then takes place; a public act, upon which the defendant claims to exclude his co-tenants, and hold in severalty. The partition was void; but it was not the less an act of adverse possession, an ouster of the co-tenants. *Jackson v. Brink* decides that a deed or paper, though void, may yet operate

[1] *Adams on Eject.* 4th ed. 134.

[2] See *Clapp v. Bromagham*, *post* 630.

[3] *Cowen & Hill's Notes to Phil. Ev.* 488.

[4] *Humbert v. The Trinity Church*, 24 *Wen.* 587. *Dig. N. Y. Rep. by Hogan*, tit. *Adverse Possession*.

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as the foundation of an adverse possession. The partition covered the premises in question. So does the deed from the defendant and Dickenson to Viele which was also more than 20 years old when this suit was commenced; and under which Viele, has held continual possession. The defendant comes in his right; and seems pretty clearly entitled to judgment, on the sole ground of adverse possession for more than 20 years before suit.

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Judgment for the defendant.(a)

*JACKSON, *ex dem.* SWORD and others, against MUMFORD.

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CASE argued, which will be found sufficiently stated in the opinion of the court.

J. S. Van Rensselaer, for the plaintiff.

J. A. Collier, contra.

Curia, per SUTHERLAND, J. The premises in question were granted by letters patent, bearing date the 5th day of November, 1790, to Peter Shults, a private soldier in captain Fink's company, in the first New York regiment. The patentee died at Fort Stanwix, in 1780, ten years before the issuing of the patent. He was a young man, and died intestate without children, leaving a father and several brothers and sisters. The lessors of the plaintiff represent the elder brother, and the defendant the father of the patentee.

The brothers of the patentee, on the 20th of November,

(a) *Vid.* La Frombois v. Jackson, 8 Cowen. 589.

the subsequent grantee of the father, who would have been preferred by the statute of descents; this being a case within the exception of the 8th section of the statute of 1803, (secs. 26, ch. 88), and the 7th of the act of 1813. (1. R. L. 305.) The words "held by *bona fide* purchasers or devisees," used in those acts, do not contemplate an actual possession and improvement of the lots, but any one holding the legal title.

Where a patent of land was granted to a soldier who died intestate without children, and having a father and brothers, before our statute of descents, in consequence of which the land descended to his elder brother as at common law, who conveyed the land on the 20th of November, 1795, subsequent to the statute of descents, to a *bona fide* purchaser; held, that the grantee of the brother should be preferred to

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1795, conveyed the premises to Sebastian Visscher; and the deed was recorded the 20th of October, 1796.

The patentee died previous to the 27th day of March, 1783; and by the express provision of the 1st section of the act of April 5th, 1803, the title to his lot was vested in him at the time of his death. Our statute of descents was passed on the 23d of February, 1786; and the 8th section of the act of 1803, provides that the rules of descent established by the act of 1786, shall apply to and govern in all the cases provided for by the 1st section of the act of 1803, "except where the lands specified in any of the letters patent therein mentioned, or any part thereof, were on the 5th day of April, 1803, held by *bona fide* purchasers or devisees, under any person or persons who would have been the heirs at law of the patentees, if this provision had not been made." The premises in question fall within

[*255] • the exception, having, prior to 1803, been conveyed by Peter Shults, who is admitted to have been the elder brother of the patentee, and his heir at common law, to Sebastian Visscher.

The act does not contemplate an actual possession and improvement, when it speaks of the lots being held by *bona fide purchasers* or devisees under the heir at law. The term was undoubtedly used in its legal sense, and is synonymous with the possession or holding of the title. (Stevens v. Woolsey, 9 John. 325. Jackson v. Phelps, 3 Caines, 62. Jackson v. Winslow, 2 John. 80. 10 John. 495.)

The plaintiff is entitled to judgment according to the stipulation in the case.

Judgment for the plaintiff.

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TOMPKINS *against* CORWIN.

DEBT on bond for the non-performance of an award, tried at the Onondaga circuit on the 12th of October, 1826, before THROOP, C. Judge.

The declaration was thus: "That whereas the defendant, heretofore, to wit, on the 19th day of September, A. D. 1825, at, &c. by his certain writing obligatory, sealed with his seal (and now shown, &c.) the date whereof is the the same day and year aforesaid, acknowledged, &c." The penalty was \$500. The condition set forth was, "that if the defendant, his heirs &c. shall and do, &c. well and truly stand to and obey, abide by, perform, fulfil and keep the award, &c." (general submission) "so as the said award be made in writing, under the hands, &c. and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the 18th day of January next, (after the date of said writing obligatory meaning,) then the said obligation to be void or else to remain in full force." The declaration then set forth the award and breaches. Plea, *non est factum* and performance.

The oyer of the bond agreed in date and other particulars with the declaration.

At the trial, the plaintiff proved the execution of the bond by Hopping, the subscribing witness. Another witness for the plaintiff, (John Wilkinson,) proved that the original bond, being of the date declared on, limited the making of the award to the 31st of December then next;

whereas the parties extended the time for the award twice, by erasure and interlineation and the last time, to the 18th of January, 1826. *Held*, that the plaintiff might either declare on the bond simply, as both dated and made on the 19th of September, or as dated that day, and made afterwards.

Where the merits of the case are affected by the time when a deed becomes valid, the time of delivery should be stated and shown; for the delivery gives it effect as a deed. Otherwise, where time is immaterial.

• A contract may be set forth in pleading according to its legal effect, though this vary from the precise words.

A deed executed on a particular day, may in general be pleaded as made on any other day

The supreme court have often held, that in pleading time, the words next or then next may be considered as referring to the day of the month, and not the month itself.

Though the legal effect of altering, by consent of parties, the time limited to do an act, (e. g. to make an award) in the condition of a bond, leaving the original date to stand, is to destroy the bond as a pre-existing one, and to give it effect

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only from the time of the alteration, yet the bond may be declared on as bearing its original date with or without an averment that it was delivered afterwards.

A bond for performing an award was dated the 19th of September, 1825, and conditioned that the award should be made &c. on or before the 1st of December then next, and after-

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and that the time for making the award was afterwards extended to the 10th of January, 1826, by erasing the words December and 31st, and inserting the words 10th and January in the bond, with the consent of both parties. The plaintiff further proved that, on the 10th of January, the time secondly appointed as above for making the award, it was agreed that the time should be extended to the 18th of January by both parties; and one witness swore that, after the agreement, he saw some person in the act of altering the bond from the 10th to some future day, but did not recollect what day.

The defendant's counsel objected, that by the alteration, the bond became a new one; and the plaintiff ought to have set it forth as bearing date the 19th day of September, 1825, and averred that it was executed and delivered on the 10th day of January, 1826, the day when the last alteration was made, and as this was not done, there was a variance between the bond set forth in the declaration, and the one proved. The court sustained the objection; and nonsuited the plaintiff.

B. D. Noxon, for the defendant, moved to set aside the nonsuit, and for a new trial. He cited 1 Chit. Pl. 348; 1 Saund. 291, note (1); Archb. Pl. 113, 115; Com. Dig. Fait, (B. 3,) 4 East, 477.

D. Kellogg, contra, cited 1 Ld. Raym. 349; 2 Salk. 628; 3 Lev. 348; 1 Chit. Pl. 308, 351, 354; Doug. 665.

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**Curia*, per SUTHERLAND, J. This is an action of debt upon an arbitration bond. The plaintiff was nonsuited at the trial, on the ground of a variance between the bond set forth in the declaration, and that proved. The declaration states the bond to have been made on the 19th day of September, 1825, and that the award was to have been on or before the 18th day of January then next. The oyer and the bond produced corresponded with the bond set forth in the declaration; but it appeared from the testimony of John Wilkinson, a witness on the part of the plaintiff, that

the time limited in the bond for making the award, was originally the 31st of December, 1825; that it was then extended from the 31st of December to the 10th of January, by erasing the former date and inserting the latter in the bond, by the consent of both parties. On the 10th of January it was agreed to extend the time to the 18th of the same month, which was effected in the same way, by erasing the one and inserting the other date. It was then objected by the counsel for the defendant, that by the alteration, it became a new bond, of the date when it was last altered; and that the plaintiff should have set forth the bond, (as he had done) as bearing date the 19th of September, 1825, and averred that it was executed and delivered on the 10th day of January, 1826, the day when the last alteration was made. The objection was sustained by the judge, and the plaintiff was nonsuited on the ground of variance.

The legal effect of the alteration of the bond, was probably to destroy it as a pre-existing obligation, and to render it a new bond from the time of the alteration; and it would, undoubtedly, have been competent for the plaintiff to have declared upon it, as a bond which took effect at that time, though dated previously; as a *contract may*, generally, be described according to its legal effect, though such description may vary from its precise words. (1 Chitty, 307. 1 Phil. Ev. 168, note 6.) And a deed, though dated on a particular day, *may be stated*, in pleading, to have been ~~made~~ on another day. (1 Chitty, 349. 4 East, 477.)

Though a deed takes effect only from its delivery, and a delivery is of course essential to its validity, yet, it need not be stated in pleading. (1 Saund. 291, note (1).)

*Probably, in point of fact, few deeds are actually delivered on the day on which they bear date. They are generally previously prepared, and delivered at the consummation of the contract; and yet, I have met with no case, in which the objection was taken that the deed was not delivered on the day on which it bore date, although it is uniformly stated as having been then made. Where the jus-

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tice and the merits of the case are affected by the particular time when the bond or deed becomes a valid and subsisting instrument, there the time of the delivery becomes material, and may be set forth, or proved by either party. But where it is a mere question of variance, designed to defeat the action, without in any manner bearing upon the merits of the case, I am inclined to think the defendant ought not to be permitted to say that the deed was not delivered on the day when it bears date. He should, in such a case, be held concluded by his own signature to the deed, from denying that its date is the true one.

In this case, it is a mere matter of form; for admitting the date to have been the 10th of January, it would not change or affect any material allegation in the declaration. The declaration avers that the award, by the terms of the bond, was to be made on or before the 18th day of January next ensuing the date of the bond. It is contended by the defendant's counsel, that if the date of the bond was in January, 1826, then the award was not to be made until January, 1827; whereas, by the averment in the declaration, it was to be made in January, 1826. We have repeatedly held, in similar cases, that the words *next* or *then next*, may be considered as referring to the day of the month, and not the month itself. In that view of the case, therefore, there was no variance between the bond produced and the one described in the declaration.

I am, therefore, of opinion that the plaintiff was improperly nonsuited, and that the nonsuit ought to be set aside.

Motion granted.

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*Judd against Fox and HORTON.

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REPLEVIN. Demurrer to the plaintiff's pleas in bar to the defendant's avowry and cognizance. The declaration contained 8 counts; all alleging the taking by the defendants of 200 bushels of corn, the property of the plaintiff, value 100 dollars, on the first of November, 1825. The two first counts alleged the taking at a certain corn house belonging to Rufus Henry, situated on the lands owned or possessed by Henry, in the town of Lebanon, in the county of Madison. The other counts describes the place of taking as a certain common or highway, leading from one place to another, particularizing them in the town of Lebanon.

The defendants pleaded 1. *Non ceperunt*; 2. Property in the defendant, Fox, and denied property in the plaintiff; 3. They made avowry and cognizance as follows:

"And the said Horatio Fox and William Horton, for further plea, &c. come &c.; and the said Horatio, in his own right, well avows, and the said William, as bailiff of the said Horatio, well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said places in which, &c. and justly &c.; because they say, that before the said time when, &c. to wit, on the 11th day of October, A. D. 1825, at a regimental court martial, duly constituted and appointed, in pursuance of the act entitled an act to organize the militia, passed April 29, 1823, and held at the house of Eben Blakeman in the town of Eaton, Madison county, on the said 11th day of October, 1825, for the trial of all delinquencies and deficiencies

A plea to an avowry or cognizance need not allege any place of taking.

It is enough that it refer to the property mentioned in the declaration and avowry or cognizance.

The declaration in replevin stated the chattels to be the property of the plaintiff, and to have been taken from the building of a third person. Avowry and cognizance. Plea to the avowry and cognizance that the property and possession of the chattels were in the plaintiff. *Held*, no departure from the declaration; for the plea did no more than render certain what was not in terms alleged by the declaration; but which was perfectly consistent with it.

Replevin lies for goods taken in execution; they not being, at the time, in possession of the debtor in the execution. Otherwise, if in his possession. [1]

The proceedings, sentence, execution, and levy and sale under the sentence of a regimental court martial pleaded and set forth in an avowry and cognizance, of goods taken in virtue of the execution.

[1] See *Dunham v. Wyckoff*, 3 Wen. 280. *Hall v. Tuttle*, 2 id. 475, 478. Dig. N. Y. Rep. by Hogan, tit. Replevin. Replevin is by the Revised Statutes substituted for detinue, and trover. See *Wright v. Bennett*, 3 Barb. S. C. Rep. 151, 152.

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in the 8th regiment of riflemen of the state of New York, of which court martial Major Isaac Coe, junior, was president, and captain Charles H. Williams and captain Royal Richardson, all of said regiment, were members, one Rufus Henry, of Lebanon, in the aforesaid county, who belonged to captain Brown's company of riflemen in the said regiment of riflemen, by the judgment, consideration and sentence of said court, was duly convicted, according to law, of delinquencies in duty, and deficiencies in equipments as a member of said company; and therefore, by the said court martial, held by the aforesaid officers, duly fined the sum of two dollars, according to the directions and provisions of the aforesaid act; and for the collection of which fine, a warrant or execution was duly issued under the hand and seal of the said president of the said court martial, directed to any constable or marshal of the county of Madison, commanding him to levy and collect said fine of the goods and chattels of the said Rufus Henry, with his costs of collecting the same according to law; which warrant of execution was, on the day of the date thereof, delivered to one Ira Bartlett, then a constable of the town of Eaton, in the county of Madison; by virtue of which said warrant or execution, the said Ira Bartlett, within the time by the said warrant or execution, and the law, limited for making a levy, did levy upon the corn in the said declaration mentioned, then being the property and in possession of the said Rufus Henry, and according to law, the said Ira Bartlett, by virtue of the said warrant or execution, and according to the provisions of the law in that case made, did sell the said corn at public vendue, to the said Horatio Fox; and then and there delivered the same to him. And the said defendants aver that the property and possession of the said corn in the said declaration mentioned, at the said time when, &c. were in the said Rufus Henry, to wit, at the town and in the county aforesaid; without this, that the property of the said corn, or any part thereof, at the said time when, &c. was in the said Heman Judd, as by the said declaration is above supposed; and this they are ready to verify; wherefore they

pray judgment, and a return of the said corn to be adjudged to them, &c."

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The plaintiff took issue on the second plea; and to the avowry and cognizance, after *protestando* as to all the alleged proceedings of the court martial, and the levy and sale, for plea, said that the property and possession of the corn, at the time of taking, levy and sale, &c. were not in Henry, but in the plaintiff. There was also a second plea to the avowry and cognizance, substantially like the first.

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Demurrer, assigning for cause, 1. That the pleas were uncertain as to the place of taking; 2. That they departed from the declaration, which alleged *property only* in the corn—the pleas alleging both *property and possession*; and 3. That neither of the pleas answered the whole avowry and cognizance, though in their commencement they professed to do so.

Joinder in demurrer.

A summary of the pleadings is given in the opinion of court.

G. C. Bronson, in support of the demurrer.

P. Gridley, contra.

Curia, per SUTHERLAND, J. This is a demurrer to the plaintiff's pleas, in bar to the defendants' avowry and cognizance in replevin. The declaration contains eight counts, all of which allege the taking by the defendants on the 1st of November, 1825, of two hundred bushels of corn, the property of the plaintiff, of the value of 100 dollars.

The counts are all substantially alike, except as to the place of taking. The two first counts allege the place in which the corn was taken, to have been a certain corn house, belonging to one Rufus Henry, situated on lands owned or possessed by said Henry, in the town of Lebanon, in the county of Madison. The other counts describe the place of taking as a certain common or highway, leading from one place to another in the town, particularly set forth.

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The defendants plead, *first, non ceperunt; secondly, property in the goods taken, in the defendant Fox, and deny that they were the property of the plaintiff; thirdly, they avow and make cognizance of the taking; Fox in his own right and Horton as his bailiff, &c. under a judgment and execution or warrant, of a certain court martial, (whose proceedings are particularly set forth,) against one Rufus Henry; and allege the levy of the execution on the corn in question, and its sale at public auction to the defendant Fox, *to whom the corn was then delivered by the officer; and they aver that the property and possession of the said corn, at the time when, &c. were in the said Henry, &c.; without this, that the property of the said corn, or any part thereof, at the time when, &c. was in the plaintiff; and conclude with a verification. The plaintiff takes issue upon the second plea; and to the avowry and cognizance, after a *protestando* embracing all the alleged proceedings of the court martial, and the levy and sale under them, for plea saith, *that the property and possession of said corn, mentioned in the declaration, at the time of the taking thereof, and at the time of the alleged levy and sale, &c. were not in the said Rufus Henry, &c.; but the plaintiff expressly avers that the property and possession thereof, at the time above mentioned, were in the said plaintiff; and concludes to the country. There is also a second plea, which is substantially like the first. To these pleas the defendants demur specially, and assign for causes of demurrer, 1. That they are uncertain as to the place of taking; 2. They depart from the declaration; the declaration alleging only property in the corn to have been in the plaintiff; and the pleas alleging both property and possession, &c.; 3. That neither of the pleas answer the whole avowry and cognizance, although in their commencement they profess to do so.**

There seems to me to be no force in the objections taken to the pleas. The pleas do not expressly allege any place of taking; nor was it necessary. The avowry and cognizance justify the taking of the corn mentioned in the declaration, under a warrant against Rufus Henry; and aver that it was then in his possession. Two of the counts in

the declaration charge the taking to have been from a corn house on the farm of Henry; and the pleas demurred to allege that the corn mentioned in the declaration was not the property, nor in the possession of Henry. It appears, with sufficient certainty, that the pleas allude to the corn mentioned in the avowry. (1 Chit. Pl. 547.) The two first counts of the declaration state the place of taking, with all the particularity that was practicable or requisite.

The allegation of departure from the declaration is also unfounded. There is nothing in the declaration which negatives the idea that the corn was in the possession of the plaintiff when taken. The property of the corn is expressly averred to have been in him; and it is alleged to have been in a corn-house belonging to Rufus Henry, on land owned or possessed by him. Henry owned the land and the corn house; but if the plaintiff had the key of the corn house, or in any other manner had the exclusive control of the corn, the possession of the corn was his. There is nothing in the declaration inconsistent with such fact. The pleas render certain, by an express averment, that which was not in terms alleged in the declaration; but which is perfectly consistent with what is there alleged. This is not a departure. The pleas substantially answer the whole avowry and cognizance.

But it is said replevin will not lie in this case. If the goods were taken not out of the possession of Henry, the defendant in the execution, under which the taking is justified, but from the possession of the present plaintiff, then the cases of *Thompson v. Button*, (14 John. 84,) and of *Gardner v. Campbell*, (15 John. 401,) show that replevin will lie. The pleas expressly aver the possession to have been in the plaintiff, which is admitted by the demurrer, the objection as to the departure being unfounded.

The plaintiff is entitled to judgment on the demurrer, with leave to the defendants to withdraw the demurrer, and plead on payment of costs.

Rule accordingly.

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In false imprisonment, brought by a defendant in [*264]

ejectment against a lessor of the plaintiff in the ejectment suit, for an arrest on a *ca. sa.*, on the ground of the judgment having been subsequently set aside for irregularity, it is not sufficient to sustain the action, that an arrest was made on a *ca. sa.* in favor of the nominal plaintiff in the ejectment suit against the defendant. There must be some collateral evidence to connect the execution with the judgment, and the lessor with the execution. The coincidence between the sum of the judgment and execution does not sufficiently connect them; and it should be shown that the lessor, or his attorney, issued the execution, or that one of them was in some way privy to it, or had recognized it.

In ejectment, the execution for costs against the defendant, properly issues in the name of the nominal plaintiff alone.

Brown against Demont.

TRESPASS; tried at the Seneca circuit, January 16th, 1827, before THROOP, C. Judge. The case is sufficiently stated in the opinion of the court,

*J. A. Collier, for the defendant, moved for a new trial.

L. F. Stevens, contra.

Curia, per SUTHERLAND, J. This is an action of trespass and false imprisonment, brought by Brown against Demont. The trespass and imprisonment complained of, were the arrest and detention of Brown, under a *ca. sa.* in favor of James Jackson against him, for the cost of an ejectment suit, amounting to \$232 08. At the trial, the plaintiff gave in evidence an exemplification of the *ca. sa.*; and also of a certain judgment record in favor of James Jackson *ex dem.* Joseph Demont, (the defendant here,) Richard Demont and others *v.* Carey Brown, (the plaintiff here,) for the recovery of certain premises; and also for the sum of \$232 08, for damages and costs, &c. On the exemplification of this record, there was an entry that the judgment was set aside by a rule of the supreme court, as of the term of February, 1826, for irregularity. A deputy of the sheriff of the county of Seneca testified, that he received a *ca. sa.* in favor of James Jackson against Carey Brown, in month of December, 1825, by virtue of which he arrested Brown, and committed him to the limits of the jail.

Luther F. Stevens testified that he received a certified copy of the rule of the supreme court, setting aside the judgment, on the 17th day of April, 1826; and that he served the same on the sheriff within a day or two thereafter, who immediately discharged Brown from custody. The plaintiff then rested; and the defendant moved for a nonsuit; 1. Because the issuing of a *ca. sa.* in the name

of James Jackson, and the service on Carey Brown, the defendant named therein, unaccompanied with any other proof, did not necessarily make the defendant, Demont, whose name is not mentioned in the writ, liable in an action of trespass and false imprisonment, at the suit of Brown. 2. Because the judgment was voidable only; and, admitting that the defendant caused the *ca. se.* to be issued, he is not liable to be sued as a trespasser, for any act done in good faith, in pursuance of the judgment, while it remained in full force, and not set aside. The judge refused to nonsuit the plaintiff, and the jury, under his charge, found a verdict for the plaintiff, for \$50 damages.

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Demont.

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I am inclined to think the evidence was not sufficient to entitle the plaintiff to recover. The judgment in ejectment is in favor of James Jackson, and the execution for costs regularly issues in his name. But when that execution is complained of, and an action of trespass is brought for an act done under it, the action being, not against the plaintiff in the execution, who is a nominal person, but against the lessor at whose instance and for whose benefit it was issued, there must be some collateral evidence to connect the execution with the judgment and the lessor with the execution. There is nothing on the face of the execution to show that it was issued on the judgment, an exemplification of which was produced at the trial, and in which the defendant was a lessor, except the coincidence between the sum recovered by the judgment and that mentioned in the execution. But that certainly cannot be sufficient of itself. There may have been a dozen suits in favor of different lessors against the same defendant, all depending on the same question, and to which the defence was the same; and in such a case, the costs in each would probably have been precisely the same.

It appears to me, therefore, that the plaintiff failed in showing that the judgment on which this execution was issued, had been set aside as irregular. The judgment proved had been set aside; but *non constat* that this execution was issued on that judgment; and the execution itself was regular and unimpeached.

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But admitting the execution to have been issued upon that judgment, there is nothing in the case to show that it was issued by the defendant or his attorney, or that he was in any way privy to it, or had in any manner recognized it. The deputy sheriff, who executed the *ca. sa.* was examined as a witness. He does not say that he received it from the defendant, or his attorney, or agent. The question does not appear to have been put to him. It certainly was incumbent on the plaintiff, in order to make the defendant responsible in an action of trespass, for his arrest upon that writ to show that he had some agency, either in fact or in judgment of law, in procuring it to be issued. The defendant may have been aware that his judgment was irregular, and could not legally be enforced; and the execution may have been surreptitiously and improperly issued by some third person. Although it is not very probable that such was the fact, yet, we cannot judicially say that it was not; and to hold the defendant responsible upon the evidence in this case, would be to establish the principle, that the plaintiff in a judgment is of course liable for every measure taken to enforce it, unless he can show that he did not direct or authorize the act complained of. This is inverting the order of proof, and imposing on the defendant the burthen of proving a negative, which the law never does, except in a very few peculiar cases. I am inclined to think the judge ought to have nonsuited the plaintiff; but if not, the verdict is against evidence; and on either ground a new trial ought to be granted.

New trial granted.

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Whitbeck
v.
Whitbeck.

HARMON WHITBECK *against* JOHN I. WHITBECK.

ASSUMPSIT, tried at the Monroe circuit, November, 1826, before BIRDSALL, C. Judge.

The declaration contained the common money counts, and also a count for a certain messuage or tenement and premises, *with the appurtenances, sold by the plaintiff to the defendant, at his instance and request; also a count for goods sold, and on an account stated. The plaintiff furnished a bill of particulars, under an order, thus: "John I. Whitbeck to Harmon Whitbeck Dr. April 22, 1826, to balance due for a farm of land sold by H. Whitbeck to John I. Whitbeck, the value of the farm and the contract price thereof being

\$1200,00

Out of which deduct for so much due upon H. Whitbeck's mortgage on the farm, to J. Whitbeck, jun. and which John I. Whitbeck was to arrange with J. Whitbeck.

551,86

Balance due,

\$648,14

Interest on \$648,14, from Oct. 31, 1822, till paid, or till judgment. Also, to balance due on settlement of accounts between the parties, as acknowledged by John I. Whitbeck's note to that effect; but the items of which account are not now in H. Whit-

H. gave mortgage of his farm to J., after which P. recovered judgment against H. and sold his [*267] farm, he (P.) becoming the purchaser, and taking a sheriff's deed. After this H. agreed with P. to pay him his judgment, and take back the farm, and paid P. accordingly but instead of taking a deed of the farm, agreed with J. and W. (J.'s son) to sell his (H's) interest for a price agreed on; the father to convey his interest as mortgagee to his son W., by way of advancement. H. accordingly removed off the farm, and W.

removed on to it. The father conveyed his interest to W., who promised H. to pay him the price before agreed on, and P. then conveyed by deed under hand and seal, acknowledging the payment of \$10 as the consideration to W., who then refused to pay the price agreed on to H. *Held*, that H. might maintain assumpsit for the price agreed on. [1]

An agreement to purchase a farm, and payment of the purchase money, give an equitable title to the land, which a court of chancery will enforce.

The sale of an equitable title is, at law, a good consideration for a promise.

The promise to pay for land actually conveyed is valid at law, though by parol.

The rule that a deed shall not be contradicted by parol, applies only as between parties, or privies to it. And it does not apply, even as between them, in respect to the acknowledged consideration paid in a deed of land. In such case, even the grantor may show that the consideration was not paid.

A new trial will not be granted on the ground of newly discovered evidence, when the evidence is merely cumulative.

[1] *Shepherd v. Little*, 14 John. 210. *Velie v. Myers*, *id.* 164. *Galt v. Nixon*, 6 Cow 445. *Jackson v. McChesney*, 7 *id.* 36. *Thallumer v. Brinkerhoff*, 6 *id.* 102.

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beck's power or possession, and cannot be produced.

\$648,14

Interest thereon from October 31, 1822, that being the date of the note or acknowledgment, till paid, or judgment."

The evidence and other particulars of the case are stated in the opinion of the court.

The jury found for the plaintiff, with \$646,31 damages.

A. L. Jordan, for the defendant, moved for a new trial.

J. A. Collier, contra.

Curia, per SUTHERLAND, J. The evidence of Lawrence P. Whitbeck clearly establishes the fact of a settlement made between the plaintiff and the defendant, on the 31st day of October, 1822, and that the balance of \$648,14 was then found due to the plaintiff, which the defendant, John I. Whitbeck, then expressly promised to pay. This settlement related to the balance due to the plaintiff, for the farm of which the defendant was then in possession, which the plaintiff had previously owned, and upon which he had given a mortgage to John Whitbeck, junior, the father of the defendant; and the balance which the defendant promised to pay, was the value of the farm as agreed upon by the parties, over and above the mortgage. The judge charged the jury, that if they believed such promise was made, the plaintiff was entitled to recover. Their verdict establishes the fact of the making of the promise, and is in entire accordance with the evidence.

The only important question, then, is, whether that promise was binding in law, as being without the statute of frauds, and whether it is supported by a good consideration.

John Whitbeck, the father of the defendant, had a mortgage upon the farm of the plaintiff. Subsequent to the giving of that mortgage, and in 1816, Peter Whitbeck obtained a judgment against the plaintiff, upon which his farm was sold, and purchased in by Peter, (the plaintiff in the

judgment,) who received a deed for it from the sheriff. The plaintiff subsequently paid Peter the amount of his judgment, so that all his claims upon the farm were entirely satisfied. In this stage of the business, John Whitbeck, the mortgagee, and the defendant, agreed to purchase the farm from the plaintiff. It was valued at \$1806, and they were to deduct from that sum the amount of the mortgage, and pay the plaintiff the balance. The defendant accordingly moved on to the farm in 1820, the plaintiff moving off at the same time. The settlement in 1822 consisted in casting the interest on the mortgage, and ascertaining the balance over and above it. Peter Whitbeck, who held the sheriff's deed, was present at the settlement, and told the defendant and his father, if they did not do what was right with the plaintiff, he would not assign the sheriff's deed, or convey the farm to them.

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In 1823 or 1824, Peter Whitbeck conveyed the farm to John Whitbeck, by an instrument in writing, sealed and endorsed on the back of the sheriff's deed to him, expressing a consideration of \$10 paid. This conveyance or assignment bears date in 1820, but is proved to have been made in 1823 or 4.

"John Whitbeck conveyed his interest in the farm to his son the defendant, in 1820, about the time when he took possession of it, as it would seem by way of gift or advancement; and at the time of the settlement said, that as he had given John L. the farm, he must or ought to pay the plaintiff's claims upon it; and the subsequent promise of the defendant to pay, shows that he admitted the propriety and justice of the arrangement.

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I am inclined to think the plaintiff had an equitable title to, or interest in the farm, in question, which was a good consideration for the promise of the defendant. It will be recollected that the plaintiff had actually paid Peter Whitbeck the amount of his judgment, prior to the settlement with defendant, upon the understanding or agreement, that Peter, who had the legal title to the farm, should hold it for the benefit, and subject to the control of the plaintiff. This created a trust which I apprehend might have been enforced

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in a court of equity. It was, in effect, a re-purchase of the farm by the plaintiff, by a parol agreement, and the consideration money paid. The case of *Jackson ex dem. Seelye v. Morse*. (16 John. 197,) shows, that although the purchaser, under such circumstances, does not become seised at law, still he acquires an equitable interest, which a court of chancery will protect and enforce, by a decree for the specific performance of the contract. [1] The conveyance, then, from Peter to John Whitbeck, must be deemed as made at the instance and for the benefit of the plaintiff, and would unquestionably have been a good consideration for a promise on the part of a grantee, to pay the price or consideration money to the plaintiff. The promise to pay for land actually conveyed, need not be in writing. (20 John. 340.) John I. Whitbeck, the defendant, having succeeded to all the rights and interest of his father in the premises, by a conveyance from him, upon the understanding or agreement (as the evidence warrants the belief,) that he should satisfy the claim of the plaintiff, his express promise to the plaintiff to pay, is clearly founded on a good consideration, and is not within the statute of frauds. It is not a promise to pay the debt *of another. By the contract between him and his father, he had made the debt his own. Upon a consideration moving from the father to him, he promised to pay a third person, to whom the father was indebted. Here is an entirely new consideration for the promise, which makes it, in effect and in judgment of law, the debt of the son.

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This case is clearly distinguishable from that of *Van Alstine v. Wimple*, (5 Cowen, 162.) There, when the contract was made with Wimple, Van Alstine had no interest, either legal or equitable, in the land. He had not repaid the purchase money to Olcott, who purchased under the execution. Olcott verbally agreed to relinquish his purchase to Wimple, and Wimple agreed to pay Van Alstine \$600 for the land. If Olcott had refused to carry this

[1] See *Malins v. Brown*, 4 Comst. 403. *Rhodes v. Rhodes*, 3 Sanf. Ch. R. 279. *Jackson v. Pierce*, 2 John. 221.

agreement into effect, he could never have been compelled to perform it. It was an agreement in relation to land, and therefore void; and it was, as to him, entirely without consideration.

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The parol evidence to show the true consideration of the deed, or assignment, from Peter to John Whitbeck, was properly received. The plaintiff was not a party, nor in strictness, I apprehend, a privy to that conveyance; and the rule which prohibits the contradiction by parol of what is expressed in a deed, even if applicable to the consideration, I understand is confined to the parties or privies to the deed. The rule is founded on the principle that a party is estopped from impeaching or contradicting his own deed. But the rule does not apply to the acknowledgment or consideration paid in a deed, even as between the parties. (*Shepherd v. Little*, 14 John. 210. *Bowen v. Bell*, 20 John. 338.)

I see no error in the charge of the judge. The only question of fact was, whether the defendant made the promise relied upon. If he did, it was a question of law, whether, under all the circumstances of the case, the promise was binding.

There is nothing in the ground of newly discovered evidence. It is strictly cumulative upon one of the principal points in controversy upon the first trial.

Motion for new trial denied.

*JACKSON, *ex dem.* Van Keuren and others, against
HOFFMAN.

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EJECTMENT for 50 acres of land in the town of Shawangunk, Ulster county; tried at the circuit in that county, in November, 1826, before BETTS, (late C. Judge.)

All the parties defendants to a bill of foreclosure in the court of chancery are stop-

ed from questioning the title derived from the decree of sale.

A grantor, having no title conveys with covenants of seisin, quiet enjoyment and warranty. He afterwards acquires title. This in general, answers to the benefit of the grantees by way

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At the trial the following facts were in evidence: About the year 1809, Nicholas Hardenburgh died intestate, seised in fee of a farm of about 250 acres in Shawangunk, and about 4400 acres in the Hardenburgh patent, in Delaware and Sullivan counties. In 1788, the intestate had mortgaged his farm to Thomas Ellison, to secure the payment of \$966 12. Levi Van Keuren, one of the lessors of the plaintiff, and Nicholas Hardenburgh, the intestate's son, became administrators of his estate. Some time after his death, they reported his debts to the surrogate at \$3116 beyond what the personal assets would pay, including the Ellison mortgage stated at 2009 82. The Shawangunk farm was, in fact, worth sufficient to pay all the debts and something more; and the Delaware and Sullivan lands were worth at least \$2200. In December, 1812, the surrogate of Ulster, on the application of the administrators, made an order for the sale of the Shawangunk farm, for the payment of debts; and on the 7th of September, 1814, the administrators acting under that order and by deed reciting it, conveyed to Herman Ruggles in fee the premises in question, part of the Shawangunk farm, for the consideration of \$1125, superadding personal covenants by Levi Van Keuren and Nicholas Hardenburgh, (the administrators) of *seisin* and power of sale, of quiet enjoyment and of general warranty. On the 4th of July, 1816, Ruggles conveyed the 50 acres to Thomas Bruyn; and Hoffman, the defendant, entered, and is in possession under an agreement to purchase of Bruyn.

of estoppel against the grantor, who cannot recover the land from the grantee in virtue of the subsequently acquired title. [1]

But where a grantor recites in his deed that the grant is subject to a certain claim, (e. g. a mortgage) and then covenants that he is seised, that the grantee shall quietly enjoy, and that the grantor will warrant against all claims, the recital qualifies the covenants; and prevents their application to such claim.

Where there is any thing for a warranty to operate upon, the doctrine of estoppel does not apply.

Nor does it apply except as between the same parties acting in the same character.

[1] *Vanderheyden v. Crandall*, 2 Denio, 925. *Jackson v. Marry*, 12 John, 294. *Jackson v. Wright*, 14 *id.* 193. *Jackson v. Matsdorf*, 11 *id.* 9. *Pettereau v. Jackson*, 11 Wen. 110. *Wilson v. Troup*, 2 Cow. 195. *Jackson v. Ireland*, 3 Wen. 99. *Jackson v. Winslow*, *ante* 1. *Bush v. Marshall*, 6 How. U. S. Rep. 221. See further, Dig. N. Y. Rep. by Hogan, tit. Estoppel. Am. Ch. Dig. by Waterman, tit. Estoppel.

*About the year 1821, Ellison's representatives filed their bill in the court of chancery for foreclosure of the mortgage of 1788, to which they made (among others) Van Keuren, Bruyn and Hoffman, parties. The master's report stated \$2814 72 to be due on the mortgage; and on the 28th of October, 1814, a part of the mortgaged premises, including the 50 acres in question, was sold by a master, and conveyed, under the decree in the chancery cause, to Levi Van Keuren, (the lessor of the plaintiff and administrator of the mortgage, who joined as such in the deed of Ruggles.) July 5th, 1825, (while Hoffman was in possession) Van Keuren conveyed the land purchased by him to Jansen and Otis, the two other lessors of the plaintiff.

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Verdict for the plaintiff, subject to the opinion of this court.

J. Sudam, for the plaintiff.

C. H. Ruggles, contra.

Curia, per SUTHERLAND, J. The defendant and those from whom he derives his title, having been parties to the suit in chancery, instituted by the representatives of Ellison, for the foreclosure of the mortgage given by Hardenburgh to Ellison, are estopped from denying the title of any *bona fide* purchaser at the sale made under the decree of foreclosure in that cause. If there was any valid defence to that suit, or any equitable ground on which the premises in question were entitled to exemption from the operation of that mortgage, it should have been put forth. Having submitted to those proceedings in silence, the parties defendants to that suit cannot now be heard to impeach the title which resulted from them. (Norris Peake, 98.)

This position seems to be conceded by the counsel for the defendant; and he therefore contends, that when Levi Van Keuren, the lessor of the plaintiff, purchased the premises in question at the master's sale, the title thus acquired enured to the benefit of his grantee and assigns; so that, in truth, the defendant's title is also in this manner derived

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from the deed of the master in chancery, under the decree of foreclosure. This is in fact the principal, if not the only point in the cause. Ruggles, under whom the defendant holds, purchased at a sale made by Van Keuren and Hardenburgh, as administrators of Nicholas Hardenburgh the elder, in pursuance of an order of the surrogate of Ulster county. This order was made upon the application of the administrators for the purpose of raising a fund to pay the debts of the intestate; and by the express terms of the order, the premises were to be sold, subject to the Ellison mortgage. The deed executed by the administrators recites the proceedings before the surrogate, and the order of the sale. Ruggles, therefore, was fully apprised that he purchased subject to the mortgage; and although the deed also contains a personal covenant of seisin, for quiet enjoyment, and a covenant of general warranty, yet those covenants can not, I think, be fairly construed as relating to, or embracing the Ellison mortgage, which, in a previous part of the deed, had been recited as a subsisting incumbrance upon the premises conveyed. (1 Cowen, 126.) Those covenants may have their full operation and effect by being considered as applicable to all other incumbrances except the mortgage; and it is a general rule, that where there is any thing for the warranty to operate upon, the doctrine of estoppel will not apply.

The construction contended for by the defendant, renders the deed contradictory and inconsistent in its very terms. If it had been the intention of the administrators to protect the purchaser at the sale made by them, against the mortgage, which by the very terms of the order of sale, was to remain a charge upon the premises sold, they would most probably have resorted to a special covenant, which would clearly and explicitly have expressed that intent; and not the general covenant of warranty, which, on its face, is inconsistent with the previous recitals in the deed.

I should therefore question whether Ruggles could maintain an action against the administrators upon this covenant, the mortgage having been expressly noticed, as an incumbrance subject to which the purchase was made by them.

But the purchase in this case was made by Van Keuren, in his individual character; and the covenant was made by him and his co-administrator; and the doctrine of estoppel does not apply, except between the same parties, acting in the same character. (*Jackson v. Mills*, 13 John. 463.) (a)

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I am therefore of opinion that, under the circumstances of this case, the purchase of the premises in question, made by Van Keuren, did not enure to the benefit of Ruggles, his grantee and his assigns.

If, as the evidence seems to show, the residue of the mortgaged premises, beyond the parcel purchased by Ruggles, was sufficient to have satisfied Ellison's mortgage, it was in the power of the defendant to have procured the sale of the residue under the decree of foreclosure in the first instance, if he had made a proper statement of his case in answer to the bill. If he should eventually be prejudiced, therefore, it will be attributable to his own neglect.

The plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) And vid. 8 Cowen, 565, 587.

STEPHENS *against* BAIRD.

On error from the court of common pleas of the county of Chenango.

The parties in a justice's court agreed on the suggestion of

the justice to waive their pleadings, and go into their cause on the merits. On judgment being given, one of the parties appealed; and the justice returned the agreement. *Held*, that no objection could have been taken to the form of the pleadings before the justice, and that the agreement extended also to the cause in the C. P. on appeal; and that no objection to the form of pleadings could be taken there. [1]

S. owning property, pointed it out to a constable as belonging, one fifth of it to B., against whom the constable had an execution, and was inquiring of the property with a view to the levy. The constable levied, S. receipted the property to the constable, and B.'s right was afterwards sold and bid off by the third person, *bona fide*, under the execution. S. then sold the property; and an action by the purchaser for the avails, would have shown that B.

[1] *Ross v. Hamilton*, 3 Barb. S. C. Rep. 609. *Neff v. Cate*, 12 id. 466. *Ball v. Davis*, 3 id. 211. *Dean v. Gridley*, 10 Wen. 254. *Malone v. Clark*, 2 Hill, 657. *Wood v. Randall*, 264. *Civil v. Wright*, 13 Wen. 406.

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*J. A. Collier, for the plaintiff in error.

J. Sudam, contra.

Curia, per SUTHERLAND, J. This is a writ of error to the court of common pleas of the county of Chenango. The suit was originally commenced by Baird, the defendant in error against Stephens, the plaintiff in error, before a justice of the peace, where Baird obtained a judgment for \$25 damages, and \$3 39 costs, from which judgment Stephens appealed. It appears from the return of the justice, that the plaintiff declared, before the justice, in trover, for the taking and converting by the defendant of a certain quantity of lumber. The pleading having become somewhat special and complicated, the justice proposed to the parties, that they should waive their pleadings, and try their cause upon its merits, and that no witness should be excluded who should be offered to show the equitable rights of the parties. This suggestion was assented to, and the justice states that the cause was investigated on those grounds; that is, as I understand it, all objection to the form of the pleadings was expressly waived. The lumber, for the conversion or proceeds of which the suit was brought, it appeared from the evidence in the common pleas was originally the property of one Allen Benedict; and the title of the plaintiff below was derived from a sale under a justice's judgment in favor of one Joseph Tillotson, against Allen Benedict and one James Stephens, for \$21 10. This judgment was duly proved.

and no title, inasmuch as he had not fulfilled a certain contract, on which the one fifth was to vest in him. *Held*, inasmuch as notice was not given of the contract to the purchaser, he had a right to purchase upon the faith of S.'s admissions, who should be estopped, under the circumstances, to deny B.'s interest; and that S. should account to the purchaser for the value of the one fifth. [1]

Where several parcels of property are sold under an execution at one bid, though the sale might have been fairer, and the property brought more in separate parcels; yet a third person, not a creditor, has no right to object to the manner of sale. The title passes by such a sale as to strangers.

[1] *Frost v. Saratoga Mutual Ins. Co.*, 154, 158. *Welland Canal Company v. Hathaway*, 6 Wen. 480. *Reynolds v. Lounsbury*, 6 Hill, 534. *Desell v. Odell*, 3 Hill, 215, 223. Dig. N. Y. Rep. by Hogan, tit. Estoppel, 1 Cowen & Hill's Notes to Phil. Ev. n. 225, p. 367.

The plaintiff below also proved another judgment in favor of Barnard & Hatch, against Benedict, for about \$15.

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It appeared from the evidence, and the admission of the parties, that the lumber in question was the joint property of the defendant below, John Stephens, and Benedict; one fifth of it belonging to Benedict, and the other four fifths to Stephens; and the constable who levied the execution of Tillotson against Benedict, testified that he called on John Stephens, the defendant below, and told him he had an execution against Benedict, and wished him to point out to him what lumber B. had at his mill. Stephens then showed him a pile of boards and some logs, and told him that Benedict owned one fifth part of each. The witness then levied on one fifth part of those boards and logs, and the defendant, Stephens, receipted them to him. Nothing was said by Stephens about any thing to be done by Benedict, in order to perfect his title to the lumber. The witness also levied upon the household furniture and growing crops of Benedict.

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On the day of sale, Benedict, the defendant in the execution, requested the constable to put up all the property for sale at once, stating that an arrangement had been made between him and the plaintiff in the execution and Baird, by which Baird was to bid off the property, and pay the amount of the execution, and also the judgment of Barnard & Hatch, whether the property brought that amount or not; and he and Baird were to settle afterwards. The property was accordingly put up in a lump, and Baird purchased it, being the highest bidder, for \$12, and paid Tillotson's execution for \$21 10, and Barnard & Hatch's judgment for about \$15. The witness sold the right and title of Benedict to the boards and logs, and did not remove them. He also testified that the defendant below had informed him that the whole quantity of boards was 22,000 feet; that he rafted them to Baltimore, and sold them for \$9 per thousand, and was ready to pay over to the plaintiff below one fifth of the proceeds, deducting certain claims of his on account of Benedict's not having complied with

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his contract in relation to the lumber. The plaintiff below also proved that the boards were worth (at the mill) from \$4 50 to \$5 per thousand.

The defendant below then opened his defence, and contended, 1. That the sale of Benedict's property was fraudulent and void, on account of its having been sold *en masse*, and that the plaintiff below therefore acquired no title under the sale; 2. That Benedict had no interest in the lumber which could be sold under an execution, all his interest being under a special executory contract, which at the time of the levy was open and unexecuted; 3. If such interest could be sold, then Baird the purchaser, was bound to perform Benedict's part of the contract, before he could claim any thing under the sale; 4. That the taking of the boards to market by Stephens, and selling them, were authorized by the special contract between him and Benedict, and consequently were not a conversion of the property; and if he was liable at all, it was in *assumpsit*, and not in this form of action. The defendant below then offered to prove the special contract between him and Benedict, in relation to the lumber, which was objected to by the plaintiff on the ground that the defendant had pointed out this lumber to the officer, when he came to levy his execution, as the property of Benedict, liable to be levied upon; in consequence whereof it had been sold to the plaintiff below, and a third person had become the purchaser. The objection was overruled, and the defendant below proved that the logs, out of which the boards were sawed, were taken from a lot of Benedict; that, by the contract between them, they were to draw and saw the logs, and put their boards into a raft together, and that Stephens was then to run them at his own expense, and Benedict was to have one fifth of the proceeds; and it was proved that, at the time of the sale, part of the logs were not sawed, and that Benedict did not, after that, assist in sawing them, or making the raft; but that the whole was done by Stephens.

The court charged the jury, that the defendant, Stephens, had no right to object to the sale, on the ground that the property was sold *en masse*, inasmuch as he was not a cred-

itor of Benedict, and Benedict himself requested that it might be so sold; 2. That if they believed the testimony of the constable who made the levy, that the boards and logs were pointed out by Stephens as belonging to Benedict, to the amount of one-fifth part, he was precluded now from denying that fact against a *bona fide* purchaser of Benedict's interest; and that was an interest which could be sold on execution; and that the acts of the defendant, in taking the property to Baltimore and disposing of it, amounted to a conversion. The defendant below excepted to the charge; and the jury found a verdict for the plaintiff below for \$15 damages, on which the court gave judgment.

I think upon the whole, the charge of the court was correct. After the agreement of the parties before the justice the form of the declaration became immaterial. All objections on that ground were expressly waived; and as the cause upon appeal is tried upon the pleadings below, the stipulation must be understood as extending to the common pleas, and authorizing any modification of the pleadings which the evidence would warrant and the justice of the case might require.

It does not appear that Baird, the plaintiff in this action, after he purchased the interest of Benedict in the boards, was ever informed by Stephens, the defendant, of the special contract between him and Baird, or was called on to fulfil the agreement on the part of Baird. That ground does not appear to have been resorted to by the defendant until after he had disposed of the boards, and was called on to account for one-fifth of their proceeds. He pointed out the property as Benedict's, for the express purpose of having it levied upon, without giving any intimation to the officer, at the time of the levy, or to the purchaser at the sale, that the interest of Benedict in the property was affected by any condition or qualification whatever. It would be a violation of good faith to permit him now to set up any special agreement between him and Benedict, to defeat the title of the plaintiff below, who was a *bona fide* purchaser at the constable's sale. Then was the time for the defendant below to have given notice of the special agreement

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August, 1828.

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v.
Scott.

He is precluded, then, from saying that Benedict had not an interest in the property which could be sold upon execution, or that that interest was subsequently forfeited by the omission to fulfil the special agreement on his part.

The defendant had no right to object to the manner of the sale. He was not a creditor of Benedict; and it was at the express request of the defendant in the execution.

Judgment affirmed.

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*RUSSELL *against* SCOTT.

An aged man, whose children live with him and support him, working his farm but without any contract giving them or any of them the exclusive possession, is still so possessed of his farm, in the eye of the law as to enable him, as possessor, to maintain an action for any injury to the farm.

ON error by Russell, to the Delaware common pleas, founded upon bill of exceptions in a suit there between Russell, plaintiff, and Scott defendant, in which there was a verdict and judgment for the defendant. The facts are sufficiently stated in the opinion of the court.

S. Sherwood, for the plaintiff in error.

J. Sudam, contra.

The reservation in a lease of all water courses on the demised premises, suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto, gives the lessor a right to all the mill seats with the three acres, on the demised premises, whenever he chooses to make a location. It is the same as reserving all the mill seats on the demised premises, with the three acres; but it seems, would not authorize the lessor to erect a mill or mills on any adjoining lot flowing three acres on the demised premises.

A lease was of a lot in fee, reserving seven acres, and all water courses suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto. Then the lessor demised in fee the seven acres to another lessee. *Held*, that this last lease did not carry to the lessee the lessor's reserved rights in the first lease. Such rights were not appurtenant to the reserved land. They were an incorporeal hereditament, which will pass only by express grant.

A written declaration, endorsed on the lease, after the date by the lessor, that he intended to demise a greater interest than the lease expresses, is not operative to convey any interest.

The erection of a mill dam on one's own land, and flowing a neighbor's land for more than 20 years uninterruptedly, bars all right of action in the neighbor; but only for the dam as it stood. If it be raised and the flow increased within 20 years, an action lies.

A reservation of a part of a lot demised, leaves that part precisely as though it had not been a part of the lot demised; but had originally belonged to an adjoining lot.

Curia, per SUTHERLAND, J. This was an action on the case, brought by Russell against Scott, for overflowing the plaintiff's land and destroying a valuable spring of water, by the erection or raising of a mill dam. The suit was originally commenced before a justice of the peace of the county of Delaware; and was removed into the court of common pleas upon a plea of title; and brought from that court into this upon a bill of exceptions and writ of error. Both parties hold under leases in fee from Mrs. Montgomery. The lease to Russell bears date the 4th of July, 1810; that to Scott on the 1st of March, 1815; though both parties appear to have been in possession of the respective parcels for which their leases were given, many years before their date.

The lease to Russell is for a certain lot of land, particularly described, &c. containing 193 acres, excepting thereout seven acres and four perches, now in the use and occupation of Robert Scott, (the defendant,) and also saving and reserving to Mrs. Montgomery, &c. all water courses suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto; and also saving and reserving the right to erect dams and cut ditches, for the use of such water works; and also reserving all mines and minerals found in the demised premises, with the sole and only right to dig for and work the same, the lessor compensating the lessee for any damage sustained thereby. The lease to Scott of the seven acres and four rods, contained no reversion of mill streams; and the rent was proportionably higher on that account. It appeared that Scott, as early as November, 1803, contracted with Russell, the plaintiff, for the purchase of the seven acres for the express purpose of building a grist mill upon them; and the witness testified that he erected his mill dam immediately below the plaintiff's line; and that he could not have a pond there without flowing back on the plaintiff's land. The defendant had previously erected a saw mill. The consideration paid by him, was the raising of the frame of a house for Russell;

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and Scott was also to pay the rent to Mrs. Montgomery, or get a separate lease for it from her. Russell probably had a contract for a lease for the whole lot prior to that time, though the lease was not given until 1810; and when given, the seven acres which Scott then held under the contract with Russell, were excepted from his lease, and a separate lease for them given to Scott. In 1824, Scott raised his mill dam much higher than it was before, which caused the injury complained of by the plaintiff. The first dam did him no material injury. The land of the plaintiff which was overflowed, including the bed of the stream, was one acre and a half and thirty-five perches.

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The lease to Scott was produced, with an endorsement upon it signed by Mrs. Montgomery, bearing date the 8th of September, 1825, by which she declared that it was the intention of the parties to the lease, that the lessee, Scott, should have a right of erecting a mill upon the premises, and enjoy all the rights reserved to the lessor in the lease to the plaintiff, *Russell. The reading of this instrument was objected to, as was also a copy of a letter addressed to the plaintiff by David Thompson, who acted as the agent of Mrs. Montgomery. The plaintiff offered to show the amount of damages sustained by him; and also, that Mrs. Montgomery and the defendant had both refused to make him any compensation. The evidence was excluded. To which decision, as well as to the admission of the defendant's evidence, the plaintiff excepted.

The jury found a verdict for the defendant on the issue of title to the land and spring overflowed by the erection of the defendant's dam.

It was contended by the defendant, that the plaintiff had not a sufficient possession of the premises in question to enable him to maintain this action. He was an old man, of more than 90 years of age; and lived with his sons, who worked his farm and took care of him and his wife; but the title remained in the old man, and there does not appear to have been any contract between him and his sons by which the exclusive right of possession was vested in

them. The possession of the farm, as well as the title, I am inclined to think, was, in judgment of law, in the plaintiff.

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August, 1828.
Russell
v.
Scott.

The reservation of the seven acres by Mrs. Montgomery, from the lot leased to the plaintiff, left those seven acres precisely as though they had not been a part of the lot leased, but had originally belonged to an adjoining lot. Whether the reservation of the water courses, suitable for the erection of mills, with the right of erecting mills thereon, with three acres of land adjoining thereto, would authorize Mrs. Montgomery to erect a mill, not upon the lot leased to the plaintiff but upon an adjoining lot, and build a dam which would overflow three acres of the plaintiff's land, may admit of some question. The effect of the reservation is, to retain in the hands of the lessor a right to all the mill seats on the demised premises, with three acres of land adjoining, whenever she should make a location. But if there is no mill seat upon the lot, the reservation becomes nugatory and unavailing. "A water course suitable for the erection of mills," is but another expression for a mill seat or seats; for it is an absurdity "in terms to say that a stream is suitable for the erection of mills, upon which no mill can be erected.

'282.

But admitting that Mrs. Montgomery would have had a right to have erected a mill upon the seven acres reserved, and to have overflowed three acres of the plaintiff's land, did that right pass to the defendant by his lease? The lease contained no special provisions. It was a simple lease in fee, reserving rent only. The right to erect mills upon the lands demised to him, was undoubtedly acquired by the defendant; but not the right to overflow his neighbor's land with his mill-pond. That right was not appurtenant or annexed to his land. If Mrs. Montgomery possessed it, it was by virtue of a special reservation to herself; it was an incorporeal hereditament in her, which would pass only by express grant. (*Thompson v. Gregory*, 4 John. 83. *Jackson v. Vermillyea*, 6 Cowen, 680.) Nor can the defendant derive any benefit from the memorandum *on the back of his lease, made by Mrs. Mont-

UTICA,
August, 1828.

Russell
v.
Scott.

gomery, on the 8th day of September, 1825. It is a mere declaration of what were Mrs. Montgomery's intentions in giving the lease. It does not purport to convey anything. It is a mere deed of confirmation. But if it did convey anything, it was given after the commencement of this suit, and could not, of course, affect the rights of the parties.

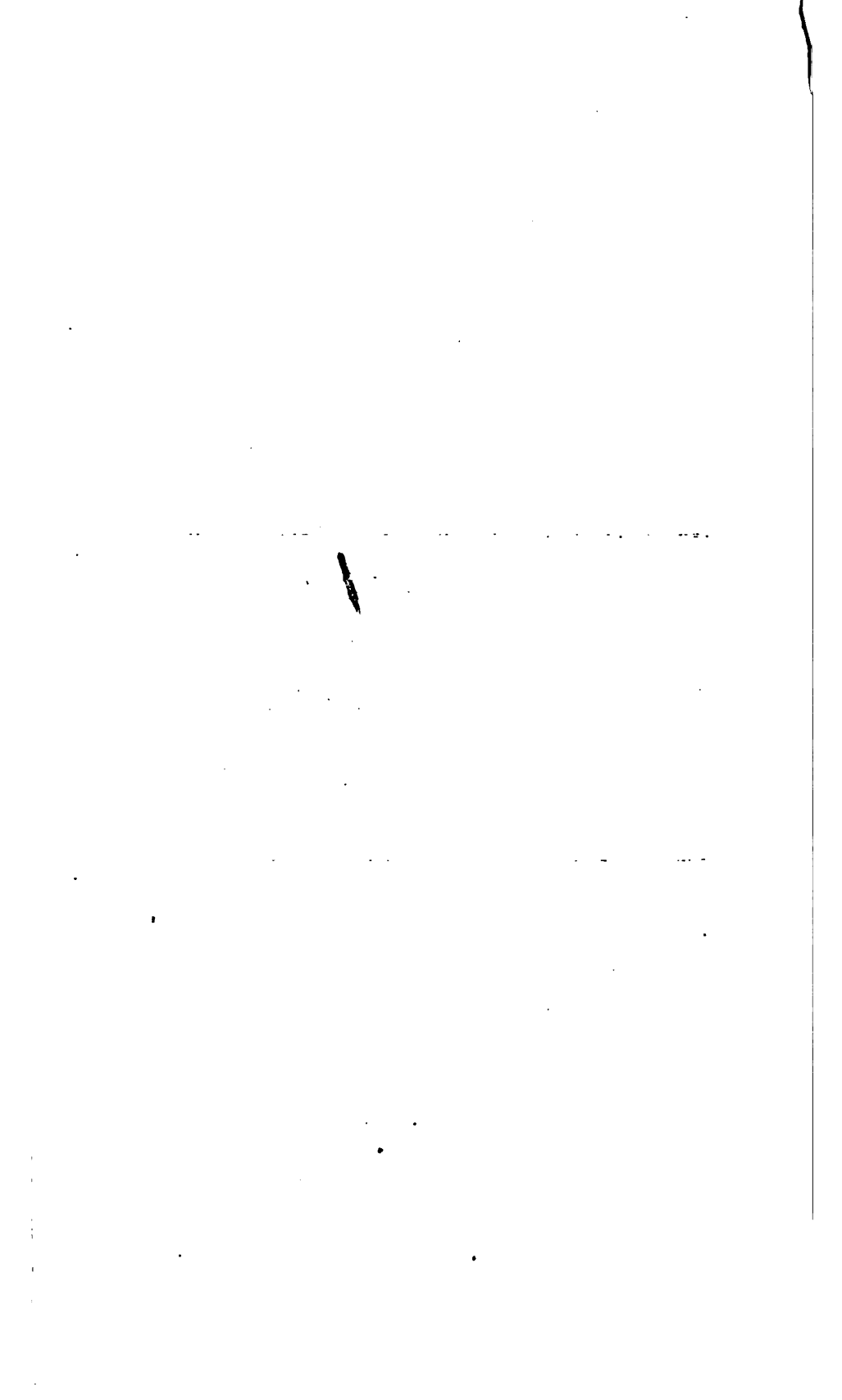
The defendant, under his contract with the plaintiff prior to 1803, erected a grist mill and dam on his seven acres. To the extent which that dam caused the plaintiff's lands to be overflowed, the defendant is protected by lapse of time. (*Stiles v. Hooker*, 7 Cowen, 266.) but the dam was raised in 1824; and it is the injury resulting from the raising of the dam at that time, of which the plaintiff complains. It appears to have driven the water some twenty or thirty rods further back, and to have covered the spring which supplied the plaintiff's family with water for their daily use.

It seems to me, therefore, that the plaintiff was entitled to recover, and that the judgment below ought to be reversed.

Judgment reversed.

END OF AUGUST TERM

RULES AND CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS.



J U D G E S

OF THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND THE

CORRECTION OF ERRORS,

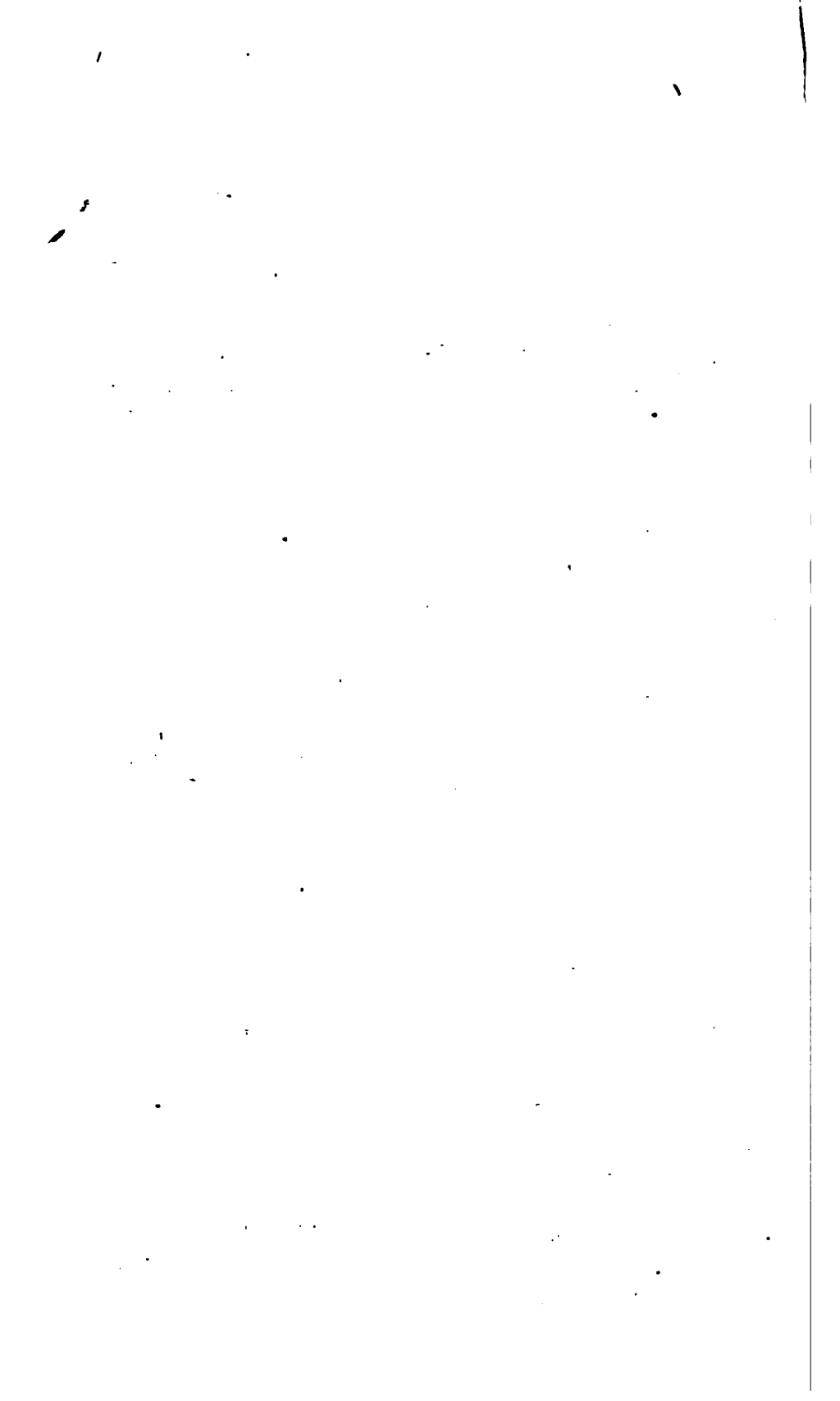
DURING THE TIME OF THE FOLLOWING REPORTS.

NATHANIEL PITCHER, *Lieutenant-Governor, President.*
 SAMUEL JONES, *Chancellor.*
 JOHN SAVAGE, *Chief Justice.*
 JACOB SUTHERLAND }
 AND } *Justices of the Supreme Court.*
 JOHN WOODWORTH, }

S E N A T O R S .

DAVID GARDINER, CADWALLADER D. COLDEN,	FIRST DISTRICT.	JOSHUA SMITH, ROBERT BOGARDIS
WILLIAM NELSON, WELLS LAKE,	SECOND DISTRICT.	PETER B. LIVINGSTON, BENJAMIN WOODWARD.
JACOB HAIGHT, RICHARD McMICHAEL,	THIRD DISTRICT.	AMBROSE L. JORDAN, JOHN McCARTY.
JOHN CRABY, JOHN L. VIELE,	FOURTH DISTRICT.	DUNCAN McMARTIN, Jr.
PARLEY KEYS, CHARLES STEBBINS,	FIFTH DISTRICT.	TRUMAN ENOS, CHARLES DAYAN.
LATHAM A. BURROWS, STUKELY ELLSWORTH,	SIXTH DISTRICT.	PETER HAGER, 2ND, THOMAS G. WATERMAN.
JOHN C. SPENCER, TRUMAN HART,	SEVENTH DISTRICT.	VICTORY BIRDSEYE, WILLIAM M. OLIVER.
JAMES McCALL, SAMUEL WILKESON,	EIGHTH DISTRICT.	ETHEN B. ALLEN, CHARLES CARROLL.

SAMUEL A. TALCOTT, *Attorney-General.*



R U L E S

OF THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND THE

CORRECTION OF ERRORS.

ADOPTED AT THE CITY OF ALBANY, THE 16th, DAY OF APRIL, 1827.

1. THE plaintiff in error shall cause the writ of error with the transcript of the judgment or proceedings on which the writ of error is founded, to be returned pursuant to the directions of the statute, or lose the benefit of the said writ, unless this court shall see cause to allow such plaintiff a further day for that purpose.

Return of writ of error.

2. If the plaintiff in error shall allege diminution of the record, it shall be done on the day the writ of error shall be returned, or within eight days thereafter, and shall thereupon apply to the clerk of this court for a certiorari to certify the diminution alleged, which the clerk shall issue of course and without special order, which certiorari the plaintiff in error shall cause to be duly returned within twelve days, or shall lose the benefit thereof, unless this court shall see cause to allow a further day for that purpose.

When diminution alleged, certiorari to be issued.

3. That the plaintiff in error, on the day the writ of error shall be returned, with the transcript of the record of proceedings, if diminution shall not be alleged, and if diminution shall be alleged, then on the return day of the certiorari, shall assign errors and file the same with the clerk, or in default thereof the plaintiff in error shall lose the benefit of the writ, unless this court shall see cause to allow further time for that purpose; and the defendant in error may

Assignment of error to be filed on the day of the return of the writ of error.

ALBANY,
April, 1827.

Rules.

Defendant to
join in error in
eight days, or
have judgment.

Case to be
made and
printed.

What the case
on a writ of
error shall
contain.

Petition of ap-
peal to this
court first to
be filed with
the register or
assistant regis-
ter.

What the pe-
tition of ap-
peal shall con-
tain.

thereupon, *on motion obtain an order that such writ of error be dismissed, with costs to be taxed.

4. That when the plaintiff in error shall have filed an assignment of errors with the clerk of this court, an order may be thereupon entered by the plaintiff in error as of course, for the defendant to join in error in eight days after the service of a copy thereof, or be precluded; and if the defendant in error shall not comply with the said order, he shall be precluded from joining in error, and the plaintiff in error may take judgment by default.

5. That in every cause upon a writ of error, the plaintiff in error shall make a case for the use of this court, on the argument thereof, and furnish to each member of this court a printed copy of such case, on or before the day of hearing, or in default thereof the plaintiff in error shall not be heard in support of the errors assigned.

6. The case to be made and printed upon a writ of error shall consist of the record or proceedings upon which the writ is brought, the error assigned, a copy of the reasons of the court, and a brief statement of the points intended to be relied on in argument.

7. That in cases of appeals, the petition of appeal addressed to this court shall be filed in the office of the register or assistant register, with whom the decree or order appealed from shall have been entered; which petition, when filed in the recess of this court, shall pray that the decree, decretal or other order appealed from, may be sent to this court on the first day of the next session thereof, and when filed during the sitting of this court the same shall pray that the decree, decretal or other order appealed from may be sent to this court without delay.

8. That in every such petition of appeal, it shall be sufficient to set forth the decree, decretal or other order appealed from, without reciting the pleadings in the cause, and stating that the said decree, decretal or other order so appealed from, or some part thereof, (specifying what part or parts,) is erroneous, and that the same ought to be reversed or modified, as the case may be.

9. That the officer of the court of chancery, with whom each petition of appeal shall be filed, shall make and annex to the said petition of appeal, the decree, decretal or other order appealed from, and such other orders as may be required to be returned to this court, without any of the pleadings, proofs and exhibits in the cause, and in case the cause had been set down for hearing, and heard prior to the decree or order appealed from, then he shall cause to be annexed also a copy of the minutes taken by the register or assistant register, respecting what was read or used in the court below, or offered and overruled on objection, or admitted at the hearing; authenticated copies of which pleadings, proofs and exhibits, or such of them as may be relied on by either party, shall be produced at the hearing by the parties.

ALBANY,
April, 1827.

Rules.

Duty of the officers in chancery on receiving a petition of appeal.

10. That the party appealing shall, in every case, cause the petition of appeal, with the matter to be annexed to the same as aforesaid, to be brought into this court, and filed with the clerk thereof, by the day mentioned in such petition, or when duly prepared by the officer as before directed, or in default thereof shall lose the benefit of such appeal, unless this court shall see cause to allow a further day for that purpose.

Petition of appeal, and the matter annexed, to be filed.

11. That on the petition of appeal being filed as aforesaid, the appellant may thereupon, as of course, obtain an order for the respondent to answer the petition of appeal in eight days after service of a copy thereof, or be precluded; and if the respondent shall not comply with the said order, he shall be precluded from answering the petition of appeal, and the appellant may proceed to take such decree as the case may require.

Order to answer petition of appeal in 8 days, and consequences of neglect.

12. That previous to any argument of counsel, upon any appeal, a state of the case of each party, as it appears in the pleadings and proofs, and a brief statement of the points intended to be relied upon in argument, and to be signed by their respective counsel, and to which shall be added the reasons of the chancellor for his decree, shall be delivered to each member of the court.

Case to be made on appeal.

ALBANY,
April, 1827.

Rules.

Attorneys and
solicitors be-
low continued

*13. That in cases of writs of error, the attornies for the parties respectively, and in cases of appeals, the solicitors for the respective parties in the courts below, shall be deemed the attorneys and solicitors for them respectively in all the proceedings on such writs of error, or appeals in this court, under these rules, unless a new attorney or solicitor shall have been employed in this court, and notice thereof given.

Fourteen days' notice of argument to be given by either party, and a copy of said notice to be furnished the clerk 4 days before the time of the argument. The clerk to make a list of the causes for argument.

14. All causes which have been put at issue in this court, may be brought on to argument upon the notice of either party, to be served at least fourteen days before the day on which it is intended to bring on the same, and which shall be some day on which the court shall be in session; and a copy of such notice shall also be furnished to the clerk of this court, at least four days before the day appointed for argument; and the clerk shall make a list of the causes thus noticed, arranging them in the order in which the joinder in error or answer to the petition of appeal therein was filed; and when the court shall be ready to proceed to the hearing of causes, the same shall be called in the order in which they stand on such list.

Either party having given notice of argument, may be heard *ex parte*.

15. When any cause put in the list as aforesaid shall be called in its order, and either party shall fail to appear, the court will proceed to hear the cause *ex parte* upon the application of any party, having given regular notice, to be shown by affidavit, or admission of service of notice, unless the court shall think proper to postpone the argument of such cause.

Preliminary questions to be first argued and passed upon.

16. That when any preliminary question, not made in the court below, and not involving the merits of the cause, is presented for argument, it shall be first argued and passed upon by the court; and the argument upon the merits of the cause shall be postponed until such preliminary question shall have been disposed of by the court, unless the court shall otherwise direct.

When distinct questions in a cause to be separately decided.

17. That when the decision of a cause depends upon distinct questions, the decision of either of which will dispose

of the cause, the questions shall be taken separately, if required by any three members.

ALBANY,
April, 1827.

Rules.

*18. That the remittitur, in case of a writ of error, shall contain a copy of the judgment of this court annexed to the writ of error, and the transcript of the record of proceedings as brought into this court, under the seal of this court, and signed by the clerk thereof; and the remittitur, in case of an appeal, shall contain a copy of the decree or order of this court annexed to the petition of appeal, and the matters thereto annexed, as brought into this court, under the seal of this court, and signed by the clerk thereof.

What remittitur to contain.

19. That all costs awarded by this court shall be taxed by the chancellor, a judge of the supreme court, or by the clerk of this court, and inserted in the judgment of this court, and form part of the remittitur, for which costs the supreme court, in cases of writs of error, shall award execution according to the course of that court; and the payment of all costs awarded by this court, in cases upon appeals, shall be enforced by the court of chancery according to the practice of that court.

Costs to be taxed by the chancellor, judges of the supreme court and clerk, and to form part of the remittitur.

20. That no member of this court shall, as attorney, solicitor, or counsel, be concerned in or argue any case in this court, either upon error or appeal, unless such member was, without reference to this court, actually retained and employed in the cause in the court below, before the judgment or decree on which the writ of error or appeal is founded was rendered: provided, however, that this rule shall not extend to causes in which any member of this court was actually retained as attorney, solicitor or counsel, previous to his becoming a member thereof.

No member of the court to argue a cause unless retained before the judgment or decree below, or previous to becoming a member.

21. That at the hearing of causes on appeal or writs of error, not more than one counsel shall open the argument, and no more than two counsel shall answer, and no more than one counsel shall reply or close, except in special cases on appeal, where there are distinct parties on the same side having distinct interests in question.

No more than two counsel to be heard on each side.

22. That special motions shall require a notice thereof,

Four days notice of special motions.

ALBANY,
April, 1827.

Rules.

When chan-
cellor and
judges of su-
preme court
shall not have
a voice in the
decision of a
question.

with copies of the papers, not records of this court, to be served at least four days before the motion is made.

*23. That when an appeal from any decree of the chancellor shall be heard in this court, the chancellor may state his opinion upon every matter that shall arise on such hearing, but shall not have a voice in the decision of the court on any question whatever arising on such appeal; and that when a cause shall be brought into this court by a writ of error on the question of law in a judgment of the supreme court, the judges of such court may severally state their opinions upon every matter that may arise on such hearing, but shall not have a voice in the decision of the court on any question whatever arising in the cause so brought into this court.

On whom ser-
vice of papers
to be made du-
ring the sitting
of the court.

24. The service of all motions, copies of orders and affidavits in this court, during the sitting of the court, may be made on the counsel of the parties attending the court, and also on the agent in the court of chancery, or supreme court, of the solicitor or attorney for the parties; but when made on agents or counsel, double the usual time shall be required.

Cause not to
be argued, if
the reasons of
the court be-
low are not
annexed to the
case.

25. Whenever a party brings on a case for argument, and the reasons of the court below shall not be annexed to the cases delivered, the cause shall not be heard, unless it appear by affidavit that application has been made for such reasons, and that the same could not be obtained.

Orders that
may be enter-
ed in vacation.

26. Orders to assign errors, to file petitions of appeal and to answer such petitions, or to join in error, may be entered at any time by the clerk, of course, in the minutes of the court, upon the written request of the solicitor, attorney or counsel, at the peril of the party entering the same, with the like force and effect as if entered by direction of the court during its session.

No decision to
be given on in-
terlocutory
questions, &c.
on default of
not opposing,
but the motion
to be heard
ex parte.

27. Whenever any matter is moved for a hearing, whether upon the merits or upon a preliminary or interlocutory question, pursuant to notice for that purpose, and the party whose right it is to appear and oppose, shall make default,

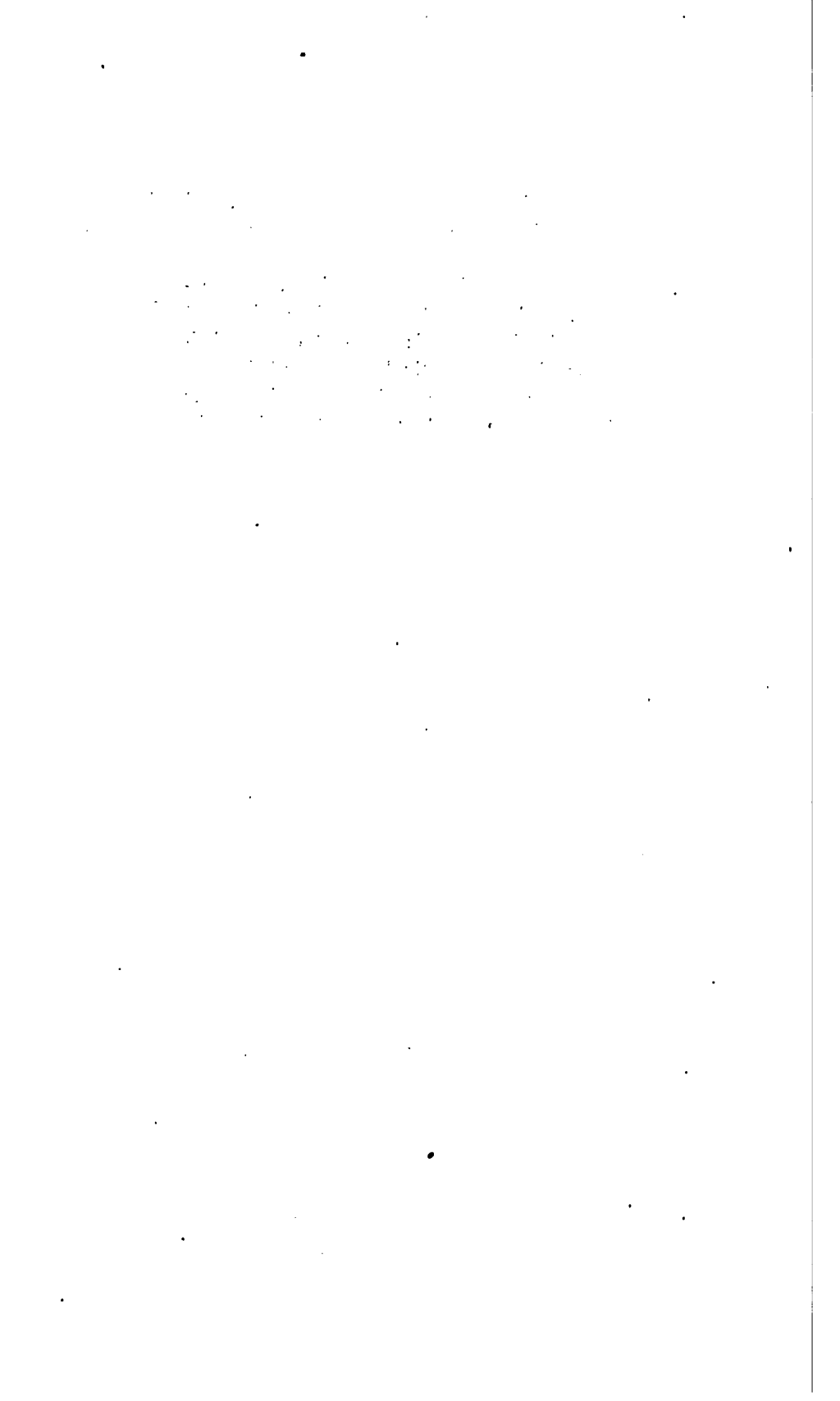
the court will proceed and hear the matter *ex parte*; and no decision will be given upon the mere default of appearance.

ALBANY,
April, 1827.

Rules.

*28. That in cases not already provided for, the practice of this court shall be similar to the practice of the court of exchequer chamber in England; and that on appeals it shall be conformable to that of the house of lords in England, when sitting as a court of appeals, until further order; and that all former rules made by this court relative to its practice be vacated.

Provision made
for cases not
provided for by
these rules.



CASES
ARGUED AND DETERMINED
IN
THE COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
OF THE
STATE OF NEW YORK,
IN DECEMBER, 1827.

SAMUEL C. RAYMOND, plaintiff in error,

against

EPHRAIM WHEELER, defendant in error.

In an action on a judgment in the name of a judgment creditor, for the benefit of an assignee of the judgment, the defendant cannot set off a debt due to him from the assignee.

A plea of set-off is inadmissible under the statute (1 R. L. 515.) The defendant can avail himself of a set-off, by notice only with the general issue.

In an action by one in his own name, for a debt due to him in trust for another, the defendant cannot set off a demand against the *cestui que trust*.

Where W. assigned a judgment in his favor to L. and K., who gave notice to the debtor, and then assigned to E., who assigned to another, notice of the two last assignments not being given to the debtor; in debt on this judgment by the last assignee, in the name of W. held, that the debtor could not set off a demand due to him from E., though it was due from E. while he owned the judgment.

A special plea in bar, affirming a fact in avoidance of the action, admits the cause of action stated in the declaration. (E. g. plea of payment to a declaration on a judgment.)

ALBANY,
Dec. 1927.

Raymond
v.
Wheeler.

*In pleading, a fact asserted on one side, and not denied on the other, is admitted.

Several instruments in writing and under seal, passing between parties at the same time, shall be taken as parts of the same transaction, and make together but one instrument.

Thus, where a defendant was, after judgment, surrendered by his bail, but not charged in execution, ~~and~~ ^{and} wished to visit his family; and the plaintiff consented, and acknowledged payment of the judgment, under hand and seal, taking a bond from the defendant, of the same date with the discharge, for his return, reciting the surrender and the agreement that he might visit his family, ~~and~~; ^{and} ~~that the two papers should be considered together as one instrument, and were not evidence at all, under a plea of payment.~~

On error from the supreme court. 5 O'Connell, 251, S. C. by the title of *Wheeler against Raymond*.

The cause was argued here by

S. A. Foot, for the plaintiff in error, and

Talcott (attorney-general,) contra.

JONES, Chancellor, examined the questions presented by the case at large, and delivered an opinion in favor of affirming the judgment of the supreme court, substantially on the ground taken by that court.

STEBBINS, Senator. The plaintiff below declared in debt on judgment; and the defendant below pleaded a release. The plaintiff below replied that he assigned the judgment to Lush & Kane, who assigned to Jonathan Roberts, and that Roberts assigned to J. E. Robinson, for whose benefit the suit was brought. To this replication the defendant below pleaded a set-off against Roberts; and the plaintiff below demurred.

Questions.

The questions raised by the demurrer are, whether such a set-off is available to the defendant; and whether a set-off can, in any case, be specially pleaded.

The question discussed in the opinion pronounced by the supreme court is, whether a set-off can be allowed against a *vested que trust* in an action commenced by the trustee. But, with great respect, I cannot perceive that that is the precise question in this cause, although if it is

conceded that a defendant can in no case avail himself of a set-off against a "person not a party to the record, then, certainly, the defendant in this cause is not entitled to avail himself of the set-off pleaded.

ALBANY,
Dec. 1837.

Raymond
v.
Wheeler.

The person against whom the defendant claims to set-off, is neither party to the record, nor *cestui que trust*; but one through whose hands the judgment has passed, and who, at the time of the commencement of this suit, had no legal or equitable claim to it. The suit was prosecuted by Wheeler, the nominal plaintiff below, for the benefit of Robinson, the *cestui que trust*.

Although the defendant below in this cause, therefore, may not be entitled to set-off a demand against Roberts, it does not follow that he might not set-off a demand against Robinson, the *cestui que trust*; and such, in my judgment, is the true state of the case.

Our statute (1 R. L. 515) enacts, that if two or more persons dealing together, be indebted to each other, or have demands arising on contract or credits against each other, and one of them sue any one or more of the others, it shall be lawful for such defendant to plead the general issue, and give notice in writing with the said plea, of what such defendant will insist upon at the trial for his discharge, and to give any such demand, &c., so given notice of, in evidence. And if it appears to the jury that the plaintiff is overpaid, then they shall find a verdict for the defendant, and certify to the court how much they find the plaintiff to be indebted to the defendant, more than will answer the debt or sum demanded; and the sum so certified shall be recorded with the verdict, and the defendant shall have judgment and execution for the same.

Statute of set-off. (1 R. L. 515.)

The English statute differs from ours, by expressly providing that the defendant may plead a set-off specially, and by not providing for the recovery of any balance which may be found due to the defendant.

The object of these statutes was to settle, in one suit, the existing demands between the parties, without compelling them to resort, for that purpose, to cross actions or a bill in equity; and the construction of them has been liberal, as the object to be attained was desirable.

Object.
Construction.

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*Considering that the English statute was passed at a time when assignments of choses in action were comparatively but little known, and that it has, from time to time, received the construction of the courts in reference to such assignments as they became more frequent, it is not surprising, perhaps, that the terms, persons dealing together and suing each other, should be held to comprehend other persons than parties to the record, although, perhaps, the same language used in a statute passed at this day, when such assignments are matters of daily occurrence, might, with propriety, be held to extend only to the parties before the court, for the reason, that as others were not expressly provided for, the inference would be a fair one that the omission was intentional.

It is a matter of curiosity to observe the difference of construction which has been given to many of the older statutes at different periods, as the state of society, or the inclination of the courts, has varied. The statute of limitations, which was at one time all but repealed, seems now to be in the course of judicial restoration; and this statute of set-off, which has for many years been construed so as to protect almost every description of equitable interest, seems now to be gradually contracting its sphere of influence, so as to embrace only the mere parties to the record.

Whatever might be the true construction of the statute, if it were now first presented for judicial examination, it is still a very grave question, whether a settled construction ought to be altered, if it can be adhered to.

Bottomley v.
Brooke, 1. T.
R. 621.

In the case of Bottomley v. Brooke, (1 T. R. 621,) which was an action upon a bond, the defendant pleaded that the bond was given to the plaintiff, as trustee for Mrs. Chancellor, and that she was indebted to him in a larger amount. The plea was considered good by the court, and the case was afterwards cited with approbation by the English courts.

Ruggles v.
Keeler, 3 John.
263.

A similar set-off against the *cestui que trust*, was successfully urged in the case of Ruggles v. Keeler, (3 John. 263,) in the supreme court of this state; although the question presented to the court was not as to the admissibility of a set-off on that ground, but whether the demand offered to be

set-off was barred by the statute of limitations. It is certainly, *therefore not a strong case ; but I apprehend the general sense of the community has been in accordance with these cases, until the recent decisions in the present cause, (5 Cowen, 233 ;) and *Johnson v. Bridge*, (6 Cowen, 698.)

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In the case of *Tuttle v. Beebe*, (8 John. 152,) the defendant was allowed to set-off a bond executed by the plaintiff to a third person, which the defendant held as assignee ; and the court, in their opinion, cite the case of *Bottomley v. Brooke* as a strong one in support of the principle.

Tuttle v. Beebe. 8 John. 152.

The case of *Tuttle v. Beebe* is recognized in the opinion of the court in this cause, and the doctrine now seems to be, that the defendant assignee is allowed to set-off against plaintiff ; but that a defendant is not allowed to set-off against the real plaintiff who sues in the name of his trustee, or, in other words, that a *cestui que trust* is entitled to the privilege of set-off, but that a set-off is not admissible against him.

If the equitable rules which have been adopted by courts of law for the protection of assignees of choses in action, are productive of substantial justice, as without doubt they are, it must be conceded that, in cases of set-off especially, the protection should be mutual, if the terms of the statute will warrant such a construction.

Stebbins, Senator, argues that the defendant should have a right of set-off against the plaintiff's *cestui que trust*.

The difficulty arises from the clause giving the defendant a right to a certificate and judgment, for any balance that may be found in his favor ; but it appears to me that difficulty may be surmounted without taking any unwarrantable liberty with the terms of the statute in endeavoring to carry into effect the intention of the legislature.

The first part of the section gives the right of set-off between persons having mutual dealings where one sues the other. This has been held to comprehend persons not parties to the record, a *cestui que trust* of the plaintiff in *Bottomley v. Brooke*, and a defendant *cestui que trust* in *Tuttle v. Beebe*. They were considered the parties litigating, and, therefore, within the terms of the statute. But, by the subsequent part of the section, the certificate is pro-

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vided for when the plaintiff is found indebted to the defendant. If it had said plaintiff on the record, there could have been no difficulty on the subject.

*In case of a set-off against the real plaintiff, not a party to the record, the defendant would be entitled to set-off to the amount of the plaintiff's demand, as he is now in England; but could have no certificate because the party suing was not plaintiff on the record.

But that question is not necessary to be decided.

Such, in my apprehension, is the fair construction of the statute; but, as before intimated, I cannot perceive that the decision of that question is necessary in the disposition of this cause; for the person against whom the defendant claims to set-off is neither party to the record, nor a party litigating; and to such only I conceive is the statute of set-off applicable. Mutual demands do not confer a right of set-off, there must be a suit; and strictly speaking, I should suppose, there could be no right of set-off until suit brought.

The defendant has a demand against Roberts, which he would have been entitled to set off in a litigation with him; and although it is true that an assignee takes a chose in action subject to all equities, yet there may be equities of which the defendant is not in a situation to avail himself consistent with the forms of law, or rather there may be facts which, under other circumstances than those in which the defendant is placed, would constitute an equity in his favor.

He is not precluded by his situation, from availing himself of any payment made to Roberts while the judgment was in his hands; but a set-off is quite different. It involves a settlement of accounts; and if admissible against intermediate parties to an instrument, who are not themselves litigating, it would lead, in many cases, to an almost endless investigation of accounts between numerous persons in a single suit.

The case of *Alsop v. Caines*, (10 John. 396,) is analogous to the present upon this point. It was brought in the name of *Alsop*, for the benefit of one *Fairchild*, to whom the demand had been assigned. The defendant pleaded a set-off against *Riley*, whom he averred was the original party in interest or *cestui que trust*; but who, at the time of the com-

Alsop v.
Caines, 10
John. 396.

menacement of the suit, had no interest in the controversy. It was not a question of set-off against a person litigating as *cestui que trust*.

*Chief Justice KENT, in the opinion of the court, remarked that a court of law could not recognize and settle such interfering and complicated trusts. "A set-off (he says) authorized at law, under our statute, only applies to the case of two or more persons dealing together, and one of them suing the other."

Being of opinion with the supreme court, (but for different reasons,) that the defence of set-off set up in this cause is not available at law, and that being the only point discussed by that court upon the demurrer, it is unnecessary, and perhaps unfit, to express an opinion upon the question arising out of the form of pleading.

Per totam Curiam,

Judgment affirmed.

NOTE. There was in this cause, in addition to the plea stated in 5 Cowen, 281, a plea of payment by the defendant below, on which issue was joined; and at the trial, a bill of exceptions was taken as to the proof of this plea, which also now made one ground of the writ of error. There was no plea denying the declaration.

The following opinion of the supreme court, after the argument of the bill of exceptions before them, will present the facts and points of the bill, with the reasoning and decision of that court, which were unanimously concurred in here.

OPINION

Of the Supreme Court, on the Bill of Exceptions.

The declaration is in debt, on a judgment in the supreme court, for \$1039 30 in January term, in the year one thousand eight hundred and twenty, recovered for an assault and battery and costs.

Plea, payment on the 18th of September, 1820.

Replication, taking issue upon the plea of payment.

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The cause was tried before Judge Edwards, on the 10th of July, 1826. The counsel for the plaintiff read the pleadings in the cause and rested. The defendant's counsel insisted that the plaintiff should produce the record declared on; but the judge decided that the production of the record was unnecessary, under the issue joined in the cause, to which opinion the defendant's counsel excepted.

The defendant's counsel then produced an instrument under seal, by which the plaintiff acknowledged himself fully satisfied for all claims and demands which he had by virtue of a judgment in his favor against the defendant for \$950, damages and costs of suit, and consents that the sheriff discharge him from his imprisonment, dated September 18, 1820.

The plaintiff then produced an obligation bearing the same date with the discharge, by which the defendant recites that he had been surrendered by his bail in the above cause, but not charged in execution. He enters into a bond in the penalty of two thousand dollars, with a condition, reciting, that whereas he was desirous of returning to his residence in Vermont, on account of the ill health of his family, and it was agreed that he might do so; provided that he should, on or before the 20th of October, then next, return to the gaol liberties of Albany, without prejudice to the plaintiff's claim, and subject himself to an execution, which he engaged to do.

The judge decided, that the two instruments should be taken together, and considered as constituting one transaction; that thus considered, they amounted to an accord and satisfaction, but would not support the plea of payment; and directed the jury to find for the plaintiff, which they did. The defendant's counsel excepted to the opinion of the judge.

There are but two questions arising upon the bill of exceptions.

1. Was the plaintiff bound to produce the record of the judgment declared on?

2. Did the facts proved amount to evidence of payment?

Both questions appear very plain to the court, and they

therefore decided the case out of its order, on the ground of the frivolousness of the bill of exceptions.

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1. It is a fundamental rule in pleading, that a fact asserted on one side and not denied on the other, is admitted. Where therefore the plaintiff founds his action upon a record of a judgment, and the defendant, instead of pleading that there is no such record, relies for his defence on the fact of *payment of the judgment, he admits the existence of the judgment, and takes upon himself the burden of proving the payment.

2. Did the facts proved show a payment?

Taking both instruments together, it seems that they prove this: that the defendant had been surrendered by his bail, but had not been charged in execution. His family were in Vermont, and sick, and he wished to visit them. To this the plaintiff agreed, provided the defendant would return and surrender himself in execution, by the time agreed on by them. To effect this, they were probably advised that a discharge from the plaintiff was necessary to protect the sheriff, and it was given.

If the first instrument taken alone amounts to evidence of satisfaction, yet considered in connection with the second, the idea of satisfaction or payment is completely rebutted. No man would consent to be imprisoned upon a judgment which he had paid.

The instrument signed by the defendant, shows that the rights of the plaintiff were not to be prejudiced by his leaving the custody of the sheriff. If there had been a payment of the judgment, the plaintiff could have no rights to be prejudiced. It seems clear, therefore, from the two instruments together, that no payment was in fact made. Whether they are evidence of accord and satisfaction, as was suggested by the judge who tried the cause, is immaterial to the present inquiry. It is only necessary for us to decide whether they amount to evidence of payment. We think they do not, and that the plaintiff is entitled to judgment upon the verdict.

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v.
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*JOHN CLAPP, plaintiff in error,
against

WILLIAM BROMAGHAM AND OTHERS defendants in error. (a)

Writ of error amended as to the *return* and *parties*, in the court of errors.
A writ of error, returnable in the court of errors, should be made returnable at a general session of that court.
Judgment in partition is against *A. and owners unknown*. Either of the defendants may bring error without joining any other; but the record must be described correctly in the writ, as to parties.

A NOTE of this case, and the decision, now farther noticed, is given in 8 Cowen, 746.

The following opinion was delivered, on the question of amendment there mentioned, by

The case.

SPENCER, Senator. The writ of error in this cause is made returnable on the 26th day of December last; and for that reason a motion is made to quash it. It is urged that the special session of this court being held on that day, by virtue of a law which declares the purpose of the sitting, that declaration operates to restrict the powers of this court to the purpose so declared. This broad proposition cannot be true; for then this court would have had no power to protect its deliberation from interruption. I understand the object of the December sitting, as expressed in the law, was merely to give notice of the business which the court would transact. But without discussing the construction of the special act, I am of opinion that the return of this writ is defective. The words of the statute are, "which writ of error, if issued during the sitting of the legislature, shall be made returnable at the place where the senate shall then sit, *without delay*, but if issued during the recess of the legislature shall be made returnable *at the next meeting of the senate, wheresoever the same shall be.*" (Vid. 1 R. L. 133, 4.) I think the true and safe construction of this clause is, that it prescribes the form of the writ as well as its substance; that

Return defective.

when the writ is issued while the legislature is in session, it is to be made returnable at the capitol in Albany, without delay. If issued during the recess, it should say, "at the next meeting of the senate, wheresoever the same shall be." Thus the time and place of the return are made dependent on the fact of a meeting of the senate, and thus all questions respecting the abatement of a suit or process by the court not being held on the appointed day are avoided. This is borrowed from the forms of process in chancery, and in the king's bench, and in the house of lords in England. Ordinarily this court adjourns to meet on some day when the senate is to convene; and if a special act of the legislature authorizes to meet at any other time, such act in itself prevents an abatement of any suit pending, although the senate may not meet. I think, then, the form of this return defective; but it is a most venial error, which ought not to prejudice any party; and if it can be amended, no doubt can exist that it should be corrected. This writ is our own process, and it would be extraordinary if we could not correct errors committed by our own officers. The statute of *jeofails*, in its terms, includes this court; but, without it, it seems to me to be a power incidental to every court, to correct its own proceedings, at any time before final judgment. And this is the rule of the inferior courts of common law, in all cases except that of a *capias* issued at the commencement of a suit. In all other kinds of process such as a *seque*, a writ of inquiry, a *perri facias*, or a *capias ad satisfaciendum*, a *seque facias* a *certiorari*, they have uniformly exercised the power of making amendments in the test and return, and in almost every other respect; and the reason for the exception of the *capias ad respondendum* is, that if it is returnable out of term, the defendant may be unreasonably retained in custody. The reason applies only to that process; and the rule should extend no further than the reason of it. I have no doubt that the defect is amendable by this court; and am of opinion that it should be amended without costs.

Another defect was pointed out in the writ, which does not seem to be so much relied on as the former. It was,

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Semb. The statute of *jeofails* applies to the court of errors.

Every court has the incidental power of amending its proceedings at any time before final judgment.

The defect is amendable.

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Judgment in
partition is a-
gainst A. and
owners un-
known; either
one may bring
error.

that the writ does not name all the parties in the record. This is a suit in partition, in which the present plaintiff in error is named as defendant with "others unknown." This is not a suit at common law, but is a peculiar proceeding given by the statute, and is regulated wholly by it. It is more like a suit in equity than an action of law; for the defendants may not only deny the right of the plaintiff or petitioner, but may, and often are obliged to contest the rights or claims of their co-defendants. There may be several claimants to a moiety or share of a tract of land, each contending against the other; so that a judgment in partition may be correct as regards the petitioner, but erroneous in respect to the mutual rights of the defendants. In such a case, each person appearing and claiming a distinct right, may well be considered a distinct party, and under the authority given by the 12th section of the partition act, (1 R. L. 512,) to "any of the parties to such judgment to bring a writ or writs of error thereon," each person would seem to be entitled to this writ of error without using the name of another defendant, who may be perfectly satisfied with the judgment. Without having had much time for reflection or examination, I should be inclined to think that any one defendant might bring a writ of error on a judgment in partition, because the judgment is several, and the question which one may present, may be entirely different from that which another would urge. Thus, in this case, a judgment has passed by default against the owners unknown; and the only question which can be agitated in this court, relates to the rights of this plaintiff in error. Would it not be sacrificing substance to form, to require those owners to be made parties here, when we cannot determine any question affecting them? The practice of summons and severance does not apply; for to whom shall the summons be directed, and how shall it be executed? It was suggested that this court might direct advertisements to be published, to bring in the owners unknown. But it is to be remembered that is a proceeding unknown to the common law, and created by the statute; and not a single step can be taken which it does not authorize; and as no mode of proceeding

in such a case is prescribed, I do not perceive how a severance of parties could be effected.

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*The reason given why all the defendants should be parties in a writ of error, is to prevent multiplicity of suit ; that is, different suits presenting the same question. But if the judgment in partition be several, the same question will not be presented on different writs of error.

But whether the writ may be brought by one defendant alone or not, it is certain that it must describe the record correctly, although it concludes to the great injury of one only. In this case the writ does not describe the record as it is ; but omits all mention of the "owners unknown." This is a defect ; but which is amendable by the express words of the statute of *jeofails*. I think the plaintiff in error should be permitted to amend his writ in this respect also. The general practice of the courts being not to encourage such objections, costs are not usually given on allowing such amendments ; and I do not think they ought to be given in this case ; and if the plaintiff chooses to amend his writ in the names of the parties, I think he ought to be permitted to do so on the same terms.

A writ of error must describe the record correctly as to parties. But if it do not, it is amendable.

I do not perceive how this court can declare the effect of these amendments upon any proceedings in the court below. That must be entirely left to the supreme court, which has ample power to do right between these parties, and prevent either being prejudiced, upon a full investigation of all the facts, We undertake merely to regulate our own process.

Rule was to amend as in 8 Cowen, 746.

CHARLES AUGUSTUS DALE, administrator *de bonis non*, &c.,
of Robert Fulton, deceased, with the last will and testament of the said Robert Fulton annexed, plaintiff in error,

against

NICHOLAS I. ROOSEVELT, defendant in error.

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In an action at law on a specialty, fraud in relation to its consideration is no defence.

But relief may be had in equity. Per VIXIE, senator.

Non est factum puts in issue the execution of the deed only. Every material averment, beside that of execution, is admitted.

*And this, though the plaintiff stipulate that, under the plea, the defendant may give any special matter in evidence as if pleaded.

What may be given in evidence upon *non est factum*. Per SAVAGE, Ch. J in assigning reasons, and Per DAYAN, senator.

The declaration was on a covenant to pay \$4,400: breach, that the defendant had not paid \$4000; and, per VIXIE, senator, this is a good breach. It merely limits the damages to the amount of the breach assigned.

A party who does not object to want of proof of the performance of a condition precedent on the trial, cannot raise the objection on error. Per DAYAN, senator.

The covenant with the plaintiff was to pay the U. S. \$11,80, and the plaintiff the residue, in notes at 6, 12 and 18 months; breach, that the covenantor had not paid the plaintiff in the manner mentioned in said agreement; *Acid*, a good assignment of breach.

ON error from the supreme court. The action below was *covenant*, by Roosevelt against Dale, administrator, &c. on sealed articles, dated September 16th, 1813, reciting that Roosevelt had discovered a coal mine on the bank of the Ohio river, (*describing the mine and the land containing it*). Roosevelt then covenanted that he would cause the land and mine to be conveyed to Fulton, the testator, by U. S. letters patent; and Fulton covenanted that when he should receive the letters, he would pay Roosevelt 4,400 dollars, viz. 1,150 dollars to the United States, and 3,250 dollars to Roosevelt, in his (F's) notes, at 6, 12 and 18 months; also an annuity of 1,000 dollars for 20 years. The declaration was upon this agreement, and assigned for breach, that neither the testator nor his personal representatives had paid to Roosevelt the said *sum of 4,000 dollars, at the time and in the manner mentioned in the agreement, &c.*, with breaches, also, in non-payment of the annuity. Plea, *non est factum*, with a stipulation by the plaintiff below that the defendant below might "give in evidence, under his plea, all matters which he might do as if the same had been specially pleaded, or notice thereof given."

On the trial, July, 1824, at the New York circuit, the

plaintiff below rested, on proving the articles and amount due. The defendant below moved for a non-suit for the variance between the agreement and breach, the former being to pay 4,500 dollars, the latter averring non-payment of 4,000 dollars only; and also, because the breach alleged the non-payment of the whole to the plaintiff below, whereas part was payable to the United States; also, because the breach was for a non-payment in cash, whereas part was payable in the testator's notes. The motion for a non-suit was overruled.

The defendant below then offered to prove that the testator had been induced to execute the articles by the false and fraudulent representations of the plaintiff below, that the lands contained a coal mine, which was untrue. This offer was overruled.

The defendant below excepted, and the judge signed a bill of exceptions, upon which the supreme court refused to grant a new trial, and the cause came here by writ of error.

In the mean time, the assignment of the breach in the declaration, was, on motion, so amended by the supreme court, as to cure the objection taken for variance as to the sum.

The reasons for refusing a new trial in the court below, were now assigned by

SAVAGE, Ch. J. As to the omission in the breach, of the 400 dollars, the declaration has been amended; and there was no variance in other respects. In general, if a breach be assigned in words containing the sense and substance of the contract, though not in the precise words, it is sufficient. (1 Chitty's Pl. 325, and the cases there cited.)

Under all the circumstances, the offer on the part of the defendant below was no more than to prove a partial failure of consideration. This cannot be admitted as a defence to a sealed instrument.[1.] In *Vrooman v. Phelps*, (2 John. 177,) an attempt was made to set fraudulent representations as

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[] Since Revised Statutes. See E. S. 4, ed. 635, § 108-9. A failure of consideration may be pleaded in bar to a recovery under a sealed instrument.

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to the quality of an article, the consideration of a specialty; but overruled. *Beecker v. Vrooman*, (13 John, 302,) was assumpsit for the price of a chattel, which is subject to different considerations from an action on specialty. In *Parker v. Parmelee*, (20 John. 130,) *Spencer, Ch. J.*, cites the first case, with *Dorlan v. Sammis*, (2 John. 179, note,) *Collins v. Blantern*, (2 Wils. 347,) and 1 Fonb. 112, in the notes, as fully establishing the doctrine, that in a court of law, a specialty cannot be invalidated for any other cause than the illegality of the consideration; as where the bond is void in law, or procured by fraud. Matter may be shown which strikes at the contract itself, in such a manner as to show that, in truth, it never had any legal entity. (2 Wils. 351.) Several examples are given in the books, as where the consideration was usurious, or simoniacal, or for compounding a felony, or for suppressing evidence in a criminal prosecution, or for the sale of an office, or for money won at play. It is said that fraud or covin may be averred against any act whatever, but, in general, relief against deeds obtained by fraud or covin is sought in equity. (1 Fonb. 112, note, and the cases there cited.) Courts of law have not gone so far as to relieve against fraud in relation to the consideration of deeds.

J. Sudam, for the plaintiff in error.

J. J. Rosevelt, for the defendant in error, cited 2 John. 177; 20 John. 134; 2 Campb. 346; 1 id. 40, note; 13 John. 430; 5 Cowen, 494, 506; 1 Chit. Pl. 314; 6 John. 543; 1 Ves. Jun. 214.

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Points.

DAYAN, Senator. It was insisted on the argument, 1. That the breach in the declaration was badly assigned, as to amount and manner of payment; 2. That there was a variance between the instrument declared on, and the one produced in evidence: 3. That the evidence of Roosevelt's false and fraudulent representations was pertinent, and

See *Case v. Broughton*, 10 Wen. 106; *Russell v. Rogers*, 15 id. 351; *Fay's Adm'r's v. Richards*, 21 id. 626; *Talmidge v. Wallis*, 25 id. 107; *Van Epps v. Harrison*, 5 Hill, 66.

should not have been rejected; 4. That the performance of the contract on the part of, Roosevelt was not admitted by the plea under the circumstances of the case.

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It cannot be necessary to examine the first objection. It was removed by an amendment. The second is not well taken in point of fact. There is no variance between the instrument declared on, and the one produced in evidence.

As to the third point; the plea of *non est factum* puts in issue the *fact* whether the instrument was the deed of the defendant, at the time of pleading the plea.

Non est factum.

Under this plea it may be shown that the defendant was, at the time of the delivery, a lunatic; (2 Stra. 1104;) or that he was made to sign it when so drunk as not to know what he did, if that drunkenness was procured by the plaintiff; (3 P. Wms. 130;) or that the defendant was a married woman; (12 Mod. 609;) or that the deed was delivered as an escrow on a condition not performed; (Bull. N. P. 172;) or that a different instrument was substituted instead of the one the defendant supposed he was executing; (12 John. Rep. 337;) or he may show, under this plea, that the deed, after execution, had been altered in a material point by the obligee or a stranger; (Shep. Touch. 71; 3 Campb. 181;) or that the deed had been altered by the obligee in a point not material, as in Pigot's case, (11 Rep. 27; 5 Taunt. 707, 710.) And any other matter which shows the consideration illegal, by common law or statute, may be given evidence under this plea. The distinction is between the *illegality* of the consideration and the *want* or *failure* of consideration.

What evidence under.

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In the case before us, the alleged false and fraudulent representations applied only to the annuity, a separate and independent covenant. But suppose it otherwise; they were clearly made in relation to the quality and value of the lands sold. Chief justice Spencer, in delivering the opinion of the court in *Dorr v. Munsell*, (13 John. Rep. 430,) says, "At law, the defendant cannot avoid a solemn deed on the ground of want of consideration. That inquiry is precluded by the very nature of the instrument." *Tompkins*, justice, in the case of *Vrooman v. Phelps*, (2 John

The fraud related to the annuity only; to quality and value, and is no defence.

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Rep. 177,) cites the case of *Dorlan v. Sammis*, in which the court held, that the want or failure of consideration, could not be set up at law to impeach a specialty. He further says, it has been repeatedly decided, that the breach of a written warranty as to the quality of the goods sold, cannot be pleaded in discharge of a bond given for the consideration; much less ought parol representations as to the quality of a thing, made antecedent to the contract, though false and fraudulent, and though they may have induced the defendant to make the purchase, be pleaded in avoidance of a specialty. (a)

Fraud admissible only where it relates to the execution of the deed.

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The court, in *Bruce v. Lee*, (4 John. Rep. 410,) say the seal does not preclude an enquiry into the consideration if illegal and fraudulent. In using the word *fraudulent*, they "evidently mean to follow some of the elementary writers" who have laid it down, without qualification, that fraud may be given in evidence under the plea of *non est factum*. But Spencer, justice, in *Dorr v. Munsell*, strips this question of all doubt and uncertainty; and lays down the true doctrine. He says, "In some of the elementary writers, it is stated that fraud may be given in evidence under the plea of *non est factum*. This must be confined to cases where the fraud relates to the execution of the instrument; as if a deed be fraudulently misread, and executed under that imposition; or where there is a fraudulent substitution of one deed for another, and the party executed a deed he did not intend to execute."

In this case, the coal mine was a part of the consideration of the agreement; and the fraud alleged was the representing that there was a coal mine on the land, when in fact there was no such mine; and that in consequence, Fulton was induced to execute the agreement. The evidence was offered to show a want or failure of consideration; and as such was properly rejected by the judge.

Non est factum puts in issue the deed only. All other material averments are admitted.

As to the fourth and last point; the plea of *non est factum* puts in issue the deed only. All other material averments in the declaration are admitted. [1] (10 John. Rep. 47. 4

(a) Wyche v. Mackin, 2 Randolph, 426, S. P.

[1] Legg v. Robinson, 7 Wen. 194; Morman v. Wells, 17 id. 136; Barney

Cowen, 173.) The averment that Roosevelt procured letters patent to be granted to Fulton for the lands, &c., and that he delivered the letters patent to Fulton, being a material averment, was admitted by the plea. The stipulation ought not, under the circumstances, to prejudice the rights of the plaintiff below, and in my opinion did not.

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But whether it did or not, the point not having been raised at the trial nor incorporated in the bill of exceptions, and the averment of performance being a material one, which, if not admitted must have been proved, before the jury could find for the plaintiff below, must be presumed to have been proved on the trial. (2 Tidd, 925, 6; 1 Term. Rep. 145, 6.)

Point not
made at the
trial.

I am, therefore, of opinion that the judgment of the supreme court should be affirmed.

*VIELE, Senator. The grounds upon which it is sought to reverse the judgment in this case, are

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1. That there was a variance between the instrument declared upon in the court below, and the one produced in evidence;

Points.

2. That the breach of covenant was not well assigned;

3. That the evidence of fraudulent representations on the part of the defendant in error, had been improperly rejected by the circuit judge; and

4. That the plaintiff in the court below ought to have been required to prove on the trial, performance of the contract on his part.

Neither of the grounds are sufficient, in my opinion, to warrant an interference with the judgment of the supreme court.

The variance complained of, does not arise in the description or setting forth of the contract, or covenant upon which the action is brought; but is sought for in the assignment of the breach of the contract; and there it only differs in the amount of the sum that is alleged not to have been paid.

Objection of
variance con-
sidered.

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Upon a covenant for the payment of a certain sum of money, there can be no good reason why the assignment of a breach for the non-payment of any portion of the amount, would not be sufficient; and least of all could it be objected on the ground of variance. The only effect of such an assignment would be, to limit the recovery of damages to an amount which the assignment would cover.

In this case, it appears from the bill of exceptions, that the plaintiff, on the trial, claimed to recover an amount within the sum alleged not to have been paid according to the covenant.

Breach in re-
spect to the
manner of
payment.

The objection to the assignment of the breach, as it respects the manner in which payment was to be made, is most certainly futile. The covenant obligates Fulton, his heirs, &c., to pay Roosevelt \$4,400, in the following manner: "The amount of the last instalments, being about \$11,50 with interest, the said Robert Fulton obligates him self to pay to the United States; and the sum of \$3,250 to the said N. I. Roosevelt, in his notes, at six, twelve and eighteen months." "Upon this the assignment is, that he hath not paid to the said N. I. Roosevelt in the manner mentioned in the said agreement; clearly negating the words and substance of the covenant. It can hardly be necessary to cite authorities for the purpose of showing such an assignment sufficient.

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Had the assignment, in this case, been more particular, and alleged the non-payment of the specific sum to the United States, and the other portion to N. I. Roosevelt, it might then have been objected, with equal propriety, that it had not alleged the non-payment in the particular notes that were contemplated by the agreement. But alleging that payment had not been made in the manner mentioned in the agreement, covers the whole branch; and fully apprises the opposite party of the real ground of claim. That is, I apprehend the only beneficial office of the assignment of a breach in an agreement.

Evidence of
fraudulent re-
presentations
inadmissible.

It is equally clear that the evidence of fraudulent representations, offered on the part of the defence, could not be received in a court of law without a violation of some of the

most ancient and best settled rules that govern such courts. The hardship of any particular case, if hardship exists, ought not to be allowed a moment's conflict with the landmarks of the law.

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It has been held that a breach of a warranty as to the quality of goods sold, made antecedently, though false and fraudulent, and though it may have induced the purchase, could not be pleaded in discharge of a covenant given for the consideration. (2 John. 177.) The undoubted rule is, that a want of consideration, or a mere failure of consideration, cannot be set up in a court of law against a valid instrument under seal. But the party is not without remedy, though this rule should be inflexibly maintained, for any real injury he may have suffered. A court of equity is the proper tribunal for him to address himself to, and always ready, and much better adapted than a court of law, to administer such relief as he can show himself entitled to in equity and good conscience.

Want of failure of consideration no defence at law against a specialty. *Aliter* in equity.

Even in this very case an opportunity has been afforded, and an appropriate occasion has been had, of showing all the *circumstances of the transaction between the parties, and claiming all the relief those circumstances would warrant; and the party was then relieved from the most onerous part of the contract; and from all that portion of it which was then supposed to be founded upon the false representations of the plaintiff below, whether originating in fraud or mistake.

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The performance of the contract, on the part of the plaintiff below, was not put in issue by the pleadings; (1 Chit. Pl. 465;) and he could not therefore be called upon to prove it on the trial. By pleading *non est factum* only, the defendant admitted every other material allegation in the declaration. This is a general rule, to which I know of no exception. (10 John. 47.)

Performance not in issue; but admitted by plea of *non est factum*.

Nor does the stipulation endorsed upon the plea, vary or effect the operation of this rule. That permits the defendant, on the trial, to give proof of such legal matter of defence as he might have in his power, without requiring it to be pleaded specially. It evidently looks at affirmative

The stipulation does not vary the rule.

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proof on the part of the defendant ; and which, if pleaded, must of necessity have admitted and avoided the allegations of the declaration ; and did not authorize the defendant below on the trial, to take issue upon a different matter in the declaration, and thus compel the plaintiff below to procure farther and other evidence, and which nothing offered on the part of the defendant below could have rendered necessary. A contrary construction would appear to me to be forced and unnatural, and not in the contemplation of the parties at the time the stipulation was given. I come to the conclusion, without a remaining doubt, that the judgment of the supreme court should be affirmed.

Thereupon, *Per totam curiam*,

Judgment affirmed.

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*SPENCER STAFFORD and others, appellants,

against

STEPHEN VAN RENSSELAER, junior, respondent.

Van D. having purchased lands of Van R., for which he had not paid,* sold part of the land to W., from whom he took two mortgages of equal date, for parts of the consideration, intending that one of the mortgages should be assigned to Van R. to secure the original consideration of the land, and that it should have priority. This was pursuant to an understanding and arrangement between Van R. and Van D. when the former conveyed. The mortgages were registered concurrently ; but the one intended for Van R. was first assigned to him, and, afterwards, the other was assigned to S. in good faith, for full value. *Held*, that the mortgage assigned to Van R. took preference.

S. took the other mortgage, subject to all the equity which Van R. had against the mortgagee.

The statute of registry has no application to such a case, as between the two assignees.

Van D. took the mortgage assigned to Van R. as trustee of Van R.

Van D. was a competent witness for Van R. in a suit between him and S.

A vendor of land has a lien upon it for the purchase money, while the land remains in the hands of the vendee, unless the circumstances show an intention not to reserve the lien.

Said that no one can take advantage of an implied waiver of the lien by the vendor, except a *bona fide* purchaser from the vendee.

On appeal from the court of Chancery. The cause was

argued and decided here, upon the case and points presented in the report of the case below. (1 Hopk. Ch. Rep. 569 to 572, S. C.)

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SANDFORD, Chancellor, assigned the reasons for the decree of the court below, as in 1 Hopk. Ch. Rep. 572 to 575.

The cause was argued here by

J. Lansing & S. M. Hopkins, for the appellants, and

A. Van Vechten, for the respondent.

The arguments were much the same as in the court below, (1 Hopk. Ch. Rep. 571, 2,) and need not, therefore, be stated here.

*SUTHERLAND, J. (After stating the facts.) As between the respondent and Van Deusen, if Van Deusen had continued to be the owner of the smaller mortgage, there can be no question of the respondent's equitable title to a priority of satisfaction.

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The original agreement between the respondent and Van Deusen was, that the balance of the consideration money not paid down, should be secured by a mortgage upon the premises; and the substituted arrangement was evidently for the accommodation of Van Deusen, and, as is admitted, at his solicitation. It is manifest that it was not the intention of the respondent, by that arrangement, to relinquish his lien upon the land.

Right, as between respondent and Van Deusen.

If the respondent had conveyed the lot directly to Wright, and Wright had executed a mortgage to him for the \$1180, and another mortgage to Van Deusen for the balance of the consideration money, and they had both been registered at the same time, I apprehend it will not be denied that the mortgage to the respondent would have been entitled to a preference. It is equally clear, that, if upon the conveyance from Van Deusen to Wright, Wright had executed the mortgage in question directly to the respondent and Van Deusen had continued to own the other mortgage, he would never have interfered with the lien of the respondent. Such

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As between
the respondent
and the appel-
lants, Van
Deusen's as-
signees.

Statute of reg-
istry not ap-
plicable.

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Respondent
not simply an
assignee; but
a *cestui que*
trust; his
rights consum-
mated by the
assignment.

A vendor has
a lien on the
land for the
purchase mo-
ney, while the
land remains
in the hands
of the vendee,
unless the cir-
cumstances
show an inten-
tion not to re-
serve the lien.

was the essence of the transaction. Van Deusen, in taking the mortgage to himself, acted as the trustee of the respondent. He took it for his benefit, and if he had refused to assign it to the respondent, a court of equity would have compelled him to do it.

Were the respondent's rights, then, changed by the assignment of the other mortgage to the appellants, nine months subsequent to the assignment made to the respondent?

The act concerning mortgages has no bearing upon the rights of the parties now before the court. The mortgages were registered at the same time; and neither can claim a priority under the act. But their being registered at the same time does not exclude the operation of any facts or *circumstances which go to show that the one ought equitably to be preferred to the other.

The respondent does not stand simply in the character of an assignee of the bond and mortgage. His equitable rights and interests did not originate in the assignment. They existed before, and the assignment was intended as a legal consummation of them. Van Deusen never was, in equity, the owner of the bond and mortgage now held by the respondent. It was taken for the benefit of the respondent; and with the declared intent and understanding, on the part of Wright, the mortgagor, as well as Van Deusen, the mortgagee, that it should be assigned to the respondent in satisfaction of the purchase money. Van Deusen was, therefore, the mere nominal mortgagee, the trustee of the respondent, who was the real party in interest. In equity, therefore, the respondent's rights are the same as though the mortgage had been taken directly to him. And, in that case, he undoubtedly would have been entitled to a preference.

A vendor has a lien on the estate sold for the purchase money, as long as it remains in the hands of the vendee, unless the circumstances in the case show that such lien was not intended to be reserved. [1] So far from any in-

[1] Bailey v. Greenleaf, 7 Wheat. 46; Garson v. Green, 1 John.'s Ch. R. 308; Fish v. Howland, 1 Page 20; Warner v. Van Alstyne, 3 id. 315; Bradley v.

ference of that kind being authorized by the facts in this case, they all conclusively and affirmatively show that the respondent did not intend to relinquish his lien. The taking of collateral personal security from a third person for the purchase money, distinct and independent of the land, has in some cases been considered evidence of the intention of the vendor to waive his lien. [1] But the bond and mortgage in question is not a security of that description; Wright was, in fact, the vendee; and the mortgage given was upon the land sold. (See *Garson v. Green*, 1 John. Ch. Rep. 308. *Gilman v. Brown*, 1 Mason's Rep. 212 to 219.) [2]

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Bailely, 1 Barb. Ch. R. 125; *Greenup v. Strong*, 1 Bibb. 690; *Voorhies v. Inston*, 3 id. 353; *Oulton v. Mitchell*, 4 id. 239; *Eubank v. Poston*, 5 Monroe 287; *Bidgley v. Carey*, 4 Harr. & M'Hen. 167-172; *White v. Casanave's heirs*, 1 Harr. & John. 106; *Chiselin v. Ferguson*, 4 id. 522; *Grave v. McCall*, 1 Call. 414; *Galloway v. Hamilton*, 1 Dana. 576; *Hundley v. Lyons*, 5 Munf. 342; *Wynne v. Alston*, Dev. Eq. R. 163; *Henderson v. Stewart*, 4 Hawkes 256; *Tribble v. Oldham*, 5 J. J. Marsh 145; *Waterman's heirs v. Read*, 7 id. 249; *Lizon v. Alexander*, id. 289; *Pratt v. Van Wyck's ex'rs*, 6 Gill and John. 495; *Howlett v. Thompson*, 1 Ired. Eq. R. 269; *Marine and Fire Ins. B'k v. Earley E. M. Charl.*, 279; *Taylor v. Alloway*, 3 Litt. 216; *Kenedy v. Woolfolk*, 3 Hayw. 197; *Daval v. Bibb*, 4 Hen. & Mann. 118; *Cole v. Scott*, 2 Wash. 141. The principal English cases are: *Chapman v. Turner*, 1 Vera. 267; *Walker v. Preswick*, 1 Vesey 622; *Austin v. Halsey*, 6 id. 483; *Nairn v. Prowse*, id. 759.

[1] It is now established in this country, (although the rule is not so strict in England,) that taking any instrument in writing, as a bond, note, or bill, with distinct security; or by accepting distinct security, on any other property, or from a third person, is evidence of a waiver of the lien by the vendor, and will discharge the same. See *Fish v. Howland*, 1 Page 20; *Francis v. Hazerligg, ex'rs*, *Hardin* 48; *Cox v. Fenwick*, 3 Bibb. 183; *Cole v. Scott*, 2 Wash. 141; *Wilson v. Graham, ex'rs*, 5 Munf. 297; *Gilman v. Brown*, 1 Mason, 297; *S. C.* 4 Wheat. 255; *Williams v. Roberts*, 5 Ohio 35; *Mayhem v. Combs*, 14 Ohio 428; *Follett v. Reese*, 20 id. 546; *Foster v. Trustees of the Athenæum*, 3 Alabama 302; *Vail v. Foster*, 4 Comst. 312. These decisions are analogous to the spirit of the Roman law, which declared that absolute property passed to the buyer, if the vendor took another pledge, or other personal security; *venditæ vero res et traditæ non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit, veluti expromissore aut pignore date*, Inst. B. 1. 41.

[2] The weight of authority is, that taking a note, bond, or covenants from the vendor, for the payment of money, says Mr. Kent, 4 Kent, 153, is not of itself an act of waiver of the lien, for such instruments are

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Appellants not
purchasers
without notice,
who, *seem*,
alone can set
up the im-
plied waiver of
lien.

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Van Deusen
a competent
witness.

Decree should
be affirmed.

But the appellants do not stand in the character of purchasers of the land without notice; and the rule seems to be, that it is only persons of that description, who can set up the implied waiver of the lien of the vendor.

Under all the circumstances of the case, it appears to me, that the appellants must be held to have taken the assignment of their mortgage, subject to all the equities which existed against it in favor of the respondent in the hands of Van Deusen. They are the mere assignees of a chose in action; and the claims of a respondent are not to be considered as the latent equities of a third person, a mere stranger, against the assignor. (2 John. 512. 2 Vern. 692, 764. 1 Ves. 123. 4 Ves. Jun. 121. 1 P. Wms. 496. 2 Wash. 233. 2 John. Ch. Rep. 441, 479. 2 Cowen, 247.)

Van Deusen was a competent witness. He does not appear to have any interest in the event of the cause. There is nothing to show that he is liable to the respondent for any deficiency in any event. The principal objection in the case of Frear v. Evertson, (20 John. 142,) was to the confessions of the assignor of a chose in action, in whose name the suit was brought, made after the assignment. The court held that his confessions, made after the assignment, could not affect the rights of his assignee; and that he could not be a witness because he was a party to the record, unless by consent. The court also say, that by the terms of the assignment, there was a contingent resulting benefit to him. There is no analogy between the cases.

I am therefore of opinion that the decree of the chancellor should be affirmed.

SAVAGE, Ch. J., concurred.

WOODWORTH, J., being related to the respondent, gave no opinion

only the ordinary evidence of the debt. See also *Winter v. Lord Anson*, 3 Russell 488; *Lagow v. Badallet*, 1 Blackf. 416; *Van Dorem v. Todd*, 1 Green, N. J. 397; *Eakridge v. M'Clure*, 2 Yerger 84; *Ross v. Whitson*, 6 id. 50.

For affirmance—CRARY, ELLSWORTH, ENOS, HAGER, HAIGHT, HART, LAKE, McMARTIN, SMITH, SPENCER, WILKINSON and WOODWARD, Senators.

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For reversal—JORDAN, McCALL and McCARTY, Senators.

For affirmance
14.

For reversal 3.

Decree affirmed.

*ROSWELL L. COLT, (who is impleaded with Peter A. Jay, administrator, with the will annexed, of Jacob Le Roy, deceased,) appellant,

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against

MARY ELIZABETH LASNIER, Countess D'AITZ, and NICHOLAS GILBERT, administrator *de bonis non*, with the will annexed, of Joseph Lasnier Dulary, deceased, respondents.

Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a *devastavit*, and is accountable to the person injured by such disposition directly, on a bill filed by him.

E. g. Where the executor, being one of a trading firm, with the knowledge of the firm, mixed the funds of his testator's estate with those of the firm, and they were thus employed in trade; *held*, that the firm were liable for these funds to a legatee of the testator;

And this, even admitting that the funds had been carried to the account of the executor, and the account as to these closed on the partnership books.

The English and American cases upon this doctrine stated and commented upon, both as they respect the rights of legatees and creditors. Per Savage, Ch. J. delivering the opinion of the court.

The executor, or, if he be dead, his personal representative, should be a party to the investigation; and the cause may stand over after a hearing and opinion given upon the merits, till he be made a party. Per Betts C. Judge, sitting for the chancellor, and giving reasons.

An administrator *de bonis non* is the full representative as to all effects not duly administered; and may seek a discovery and account of them in whosoever hands they may be, so long as they belong to the estate. Per Betts C. Judge sitting for the chancellor, and reasoning in support of his decree.

Sens. persons beneficially interested, e. g. legatees, may sue in their own names, without the aid of an administrator *de bonis non*, those dealing

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with an executor, knowing that such dealing is a misapplication of the testator's property. Per Betts C. Judge sitting for the chancellor, and, reasoning in support of his decree.

The general rules as to who are necessary parties in a court of equity adverted to as laid down by different chancellors and judges. Per Betts C. Judge, sitting for the chancellor, and reasoning in support of his opinion that a new party should be introduced.

The ordinary course in chancery, where a want of proper parties appears at the hearing, is for the cause to stand over in order that they may be added. Per Betts C. Judge, *arguendo*, sitting for the chancellor.

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"A cause was directed to stand over, at the hearing, without costs, in order to add parties, inasmuch as the defendant should have objected by plea or demurrer. Per Betts C. Judge sitting for the chancellor.

ON appeal from the court of chancery. The case below was as follows: Joseph Lamier Dulary died in the city of New York, some time in January, 1807, leaving the whole of his estate by will to his only daughter, Mrs. D'Aitz, one of the respondents, she then residing in Gaudaloupe. The will appointed her executrix, and Jacob Le Roy of the city of New York, executor. Jacob Le Roy alone proved the will. He was at the time, and so continued till his death, in 1815, in partnership with the appellant, Colt, under the firm of Jacob Le Roy & Son, with whose capital the funds of Dulary's estate were mixed, and used in their joint business or trade; both being with the knowledge and consent of the appellant. The bill was filed by the respondents in the court below against the appellant, as surviving partner, to obtain from him an account of these funds.

The answer insisted upon two grounds of defence: 1. That, stopping with the case as above stated, the firm, as such, were never accountable to the respondents but only to Jacob Le Roy; and 2. It sets up, in addition to the above case, and by way of avoidance and defence, a matter not touched by the bill; that if the firm was originally accountable, yet in November, 1814, in the lifetime of Le Roy, the executor, he ordered the accounts of Dulary's estate to be closed upon the partnership books, and transferred to his (Le Roy's,) account only, which was done.

The court of chancery, after amending the bill as to parties in the manner hereinafter mentioned, decreed the ac-

count prayed; whereupon the appellant brought his appeal to this court.

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v.
Lammie.

The cause was decided in the court below by Betts, late C. Judge sitting for the chancellor, pursuant to the statute (sess. 49, ch. 303,) who gave the following reasons for his decree, to which the reader is referred, in connection with the opinion of the chief justice delivered in this court for a sketch of the proofs upon both points of the defence:

*BETTS, C. Judge. Two objections to the case, made on the part of the complainants, are raised by the answer; either of which, if sustained, will defeat this suit upon the merits. It will be important to consider these, before adverting to the other points in the cause.

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It is first contended that the co-partnership of Jacob Le Roy & Son was never responsible to Dulary, or his representatives, for the effects of Dulary's estate in their hands; that all the responsibility incurred by the house was with Jacob Le Roy individually, who was one of the concern; and, accordingly, they were to account to him alone.

This is the general bearing of the answer, though its language is not throughout consistent with this objection.

In his first answer, the defendant insists that the account of the estate was closed and settled by the firm with Jacob Le Roy, the latter part of 1814, or early in 1815; "from which time," he says, he considered he had nothing further to do with the account, or with any of the affairs of the estate, and had a right to, and did consider himself discharged from any further liability thereon.

In his further answer, the defendant says, "by his former answer he meant to, and does aver, that from the time Jacob Le Roy gave orders to close the account, he did not and does not consider the firm answerable to Dulary or his representatives."

This language undoubtedly implies, that there was a period in which such liability did exist, and that the defendant was conscious he had for a time been under such relationship to Dulary or his representatives, that they might have recovered the effects of the estate from the firm. If

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the court adopts and acts upon this import of the answer, it wholly obviates the objection that the partnership were never answerable; and the defence would rest upon the effect of the settlement referred to and set up as a bar to this action. It might, however, be deemed an undue stress upon the terms of the answer, to fix upon the defendant so important a consequence by mere implication.

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Where no disposition is manifested by a party to suppress or evade the truth, the principle of this court is, to avoid *concluding him by nice and exact constructions of his pleadings; and it rather aims to deal with them with a view to their general scope and broad sense.

The plain tenor of both answers is, to resist the plaintiff's claim because neither the defendant nor the house of Jacob Le Roy & Son ever had any direct dealings with the estate of Dulary; and, in all transactions connected with it, acted as the mere servants or agents of Jacob Le Roy. Assuming the facts to be so, would they exonerate the defendant from responsibility in this action?

Had the house of Jacob Le Roy & Son possessed themselves of these funds tortuously, then according to the old authorities, this remedy could not be had against them, there being no privity upon which to support an account. (Dalison's Rep. 99, case 30.)

And the rule has been carried so far as to deny the action, where the property was not obtained directly from the party entitled to it, or avowedly for his use. (Fitz. ab. Accompt, pl. 97. Fitz. N. B. 119 b. 1 Vin. Abr. 142. 1 Roll. Abr. 118, pl. 5 and 6. Though Roll. puts the proposition with a *dubitatur*.)

The party claiming would undoubtedly now be permitted to waive the tort, and proceed for the value of the property, upon the implied assumpsit. The action of assumpsit is sustained upon facts far less indicative of an undertaking to pay, or of a liability in good conscience. (*Lamb v. Bunce*, 4 M. & S. 275.)

And when, from all the circumstances, a promise or direct liability to the demandant might be inferred, the party holding money or property belonging to another has always

been compelled to account to the owner, or his representatives, for it. (Brooke's Ab. Accompt, pl. 8 and 24. Fitz. N. B. 116 Q. Ibid. 118 B. note a. *Tripler v. Olcott*, 3 John. Ch. Rep. 473.)

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But, although the legal authority over the estate was possessed by Le Roy, after the death of Dulary, and he had been specially entrusted with moneys during the lifetime of Dulary, yet the proofs in the case most abundantly establish that the co-partnership had the exclusive possession and use *of all the funds ; and Mr. Hilton and Heyer prove payments of rent and dividends of stock to the firm, from time to time, and that the defendant himself had given receipt for such dividends in the name of the firm. In this respect, the firm acted as assumed trustees in behalf of the heirs and representatives of Dulary. (*Mason v. Roosevelt*, 5 John. Ch. Rep. 541.)

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The answer admits the moneys of the estate were used in the business of the firm ; and to fix beyond all question their own idea of their relationship with the estate, an account was opened and continued to December 31, 1814, upon the books of the co-partners, charging themselves and crediting the estate with moneys on hand, rents and dividends of stock received, and interest thereon, \$1719 09. This would be conclusive evidence in any court, that the firm acquired and held the moneys as belonging to Dulary's estate and not to Jacob Le Roy ; and would subject them to account to him during his life, and his representatives after his death. (Fitz. Abr. Accompt, 6 & 45. (a) This objection accordingly is overruled.

The next ground of defence going to the merits of the plaintiff's demand, is, that in November, 1814, Le Roy, the executor of Dulary, ordered the accounts of that estate closed upon the partnership books, and transferred to his account solely. The answer alleges this direction, and that the change immediately took place. The account of the firm with the estate, as written up by the defendant, closes the 31st of December, 1814, and is then carried to the individual account of Le Roy.

(a.) And vid. 6 Cowen, 497.

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It is to be remarked, that the answer cannot be received as proof for the defendant to this point, there being no allegation in the bill calling for this statement.

The testimony of Gordon, whose general character is supported, goes very strongly to prove this point in the defence.

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He says he balanced the books of the partnership on the 31st of December, or very shortly after; and that after the change of accounts, Mr. Le Roy frequently had the books at his dwelling-house, and was in the habit of inspecting them daily in the counting-house. And the witness speaks of a faint impression, that he furnished Le Roy a copy of this account subsequently. This may be corroborated by the testimony of Mr. Jay, who found a copy of Dulany's account with Le Roy's papers after his death; and that copy not being furnished me, I am probably to infer it corresponds with the present state of the books.

Enough is here proved, if Gordon is to be credited, to establish the fact that the account was altered with the assent and approbation of Le Roy; for apart from all reference to the copy of the account, it is wholly improbable and incredible that a particular of so much importance to him should have escaped his notice. He was made individually liable to his testator's estate for near \$12,000, of moneys lent to the firm; and his own account with the co-partnership must accordingly have been varied to his advantage to that amount. If he was not, in his then state of health and mind, accustomed to acquaint himself with all the dealings of the house, or if, there being no call for settlement or advances in behalf of the estate, it is not to be supposed his attention would be directed to that particular account, yet he must be deemed so far watchful of his own interests as to know how his individual account stood with the firm. And if shown conscious of the change, his consent and direction to its being made must necessarily be implied.

This branch of the case, it is therefore manifest, rests essentially upon the accuracy of the witness Gordon. He fixes the time this account was written up, from general recollection, without aid from any concurrent acts which he

can now recall. In a strict scrutiny of his testimony, it would not escape remark, that he, after all, had nothing to guide his memory but the date of the charge, and his usual habit of finishing that business. The account and date is in the hand-writing of the defendant; the witness did no more than make up the balances of the *respective accounts, and this he usually accomplished the last of the year or by the middle of January.

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The defendant resides in Baltimore or Paterson, and the decided preponderance of evidence is, that he was not in the city of New York between the 25th of November, 1814, and the 31st of January, 1815. Le Roy died the 18th of February; and the defendant was then at Trenton, attending the sitting of the New Jersey Legislature.

The defendant's permanent residence being out of the state, it was incumbent on him to show he was in the city long enough to write the accounts appearing in his hand, between the 31st of December and middle of January, the period fixed by Gordon; or otherwise prove positively that Le Roy had seen and approved this account.

I do not, however, dwell upon the proofs bearing on this inquiry, because, assuming this fact to be established as set up by the defendant, my decision will be placed upon another principle, that whenever the change in the manner of carrying on the accounts may have taken place, it not being accompanied by an actual transfer of the funds, the responsibility of the co-partnership is not affected by it. A new adjustment or statement of the accounts, and passing the amount to the credit of Le Roy with the firm, without an actual payment, is no legal acquittance. (1 Chit. Pl. 25; Buller v. Harrison, Cowp. 565. Crane v. Drake, 2 Vern. 616. Dickerson v. Lorkyer, 4 Ves. 42. 1 Equ. Cas. Ab. 240.)

It is not set up by the answer that the firm paid over the money to the executor at the settlement. The effect of the arrangement, as represented by the answer, was, that the firm held the money and Le Roy assumed the debt.

The only consideration to support this transfer is the supposed indebtedness of Le Roy to his co-partnership

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Lord Hardwicke ruled such assignment to a *bona fide* creditor good against the children of the testator. (Nugent v. Gifford, 1 Atk. 463.) Yet he recognised *Crane v. Drake*, because there he perceived a contrivance to produce a *devastavit*; and that accordingly the assignee was not a *bona fide* purchaser.

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**Crane v. Drake* was this: The testator owed the plaintiff £100. The defendant, knowing that debt, bought of the executor a lease-hold estate, paying £150 in cash, £200 in a debt due him by the testator, and the balance, £550, in a debt due him, the defendant, by the executor. The testator died possessed of a great personal estate, which the executor wasted. The master of the rolls decreed for the plaintiff; and, on appeal, the lord chancellor affirmed the decree, saying, "the defendant was a party, and consent ing to, and contriving a *devastavit*." (2 Vern. 616.)

The present case comes fully within the view taken of *Crane v. Drake* by Lord Hardwicke. The case of *Nugent v. Gifford* has never been yielded to. Lord Kenyon questions it in most direct terms, and says he would have given a contrary decision. *Bonney v. Ridgard*, 1 Cox, 145. And in *Hill v. Simpson*, it is considered an exception from the well established doctrines on this subject. (7 Ves. 152.)

[1]

Lord Thurlow ordered bonds of the testator, pledged by an executrix for her own debt, to be delivered up. The pawnees knew they were receiving the testator's effects.

He says, if one concert with an executor, by obtaining the testator's effects, and applying them in extinguishing the private debt of the executor, contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable for the full value (*Scott v. Tyler*, 2 Dick, 724, 5.)

Suits against those purchasing of factors or agents, or against creditors who receive in payment of their particular debts bills drawn by factors or vendees, is a common head of equitable relief. (Mitf. 129, 130. *Lisset v. Reave*, 2 Atk. 394. *Bowen v. Robinson*, 2 Caine's Cases Er. 341.

[1] See also *Wilson v. Moore*, 1 Mylne & K. 337; Cond. 77-83.

Bay v. Coddington, 5 John. C. Rep. 54. S. C. 20 John. Rep. 658. *Himley v. Cowing*, 7 John. C. Rep. 278.)

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It is true, executors stand on different, and, in some respects, higher grounds than agents, factors or trustees; for though in equity they are mere trustees for the performance of the will, yet in many respects, and for many purposes, third persons are entitled to consider them absolute owners of the assets in their hands. (7 John. Ch. Rep. 17.) And, therefore, in case of a fair sale, the court will never disturb the possession of the purchaser because the executor has misapplied the proceeds.[1] But the cases already cited make it most manifest, that no one, knowing their character, can deal with them for the security of his individual claim on the executor by means of the testator's assets. And Lord Thurlow goes still further, in *Scott v. Tyler*; for there the bankers swore they were ignorant of the will, and believed the bonds they received were the sole property of the executrix. The consideration of the rule, as understood and applied in England, has been more particular, on this occasion, inasmuch as chancellor Kent, in a late case, seemed inclined to adopt *Nugent v. Gifford*, and *Whale v. Booth*, as affording the true rule—that the executor had the absolute property in the assets, and could transfer them to his own benefit without any actual equivalent. (*Sutherland v. Brush*, 7 John. Ch. Rep. 17.) It is true, the chancellor, in a subsequent case against a guardian, seems to retract this doctrine, and to hold that an executor could not apply the assets in satisfaction of his own debts, nor part with them, but for a fair price paid; yet the point was not before him as to this power of an executor, and he does not question, in terms, the previous case. He says, the latter and better doctrines now is, that a creditor deals at his peril when he takes from an executor assets, knowing them such, in satisfaction of his own debt. (*Field v. Schieffelin*, 7 John. C. Rep. 150.)

Here the partnership knew perfectly the nature of these

[1] *Potter v. Gardner*, 12 Wheat. 498: 6 Cond. 606, *Wormley v. Wormley*, 8 id. 421. *Champlin v. Haight*, 10 Page, 274. *Eland v. Eland*, 4 M. & C. 420. *Wood v. White*, id. 482. 2 R. S. of New York 4 ed., 141, §78.

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funds, and took them to cover an old debt against a partner they supposed to be insolvent.

The settlement alleged to have been made the 31st of December, 1814, cannot, therefore, avail the defendant against this claim.

The determination of these two points disposes of the defence upon the merits.

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*Objections are however, taken, that the action is brought by improper parties, and that necessary parties are not made defendants.

There is no weight in the first objection. An administrator *de bonis non* is the full representative of the testator as to all effects not duly administered. [1] Com. Dig. Admr. [B. 1.] Farwell v. Jacobs, 4 Mass. Rep. 634.) He can therefore, seek a discovery and account of assets, in whosoever hands they may be, so long as they belong to the estate.

There are also well defined cases in which persons beneficially entitled to the assets can, without the aid of the administrator, sue in this court those dealing with an executor, knowing he misapplied the testator's property. (1 Madd. Treat. 267. Crane v. Drake, 2 Vern. 616.)

Two cases before cited are those of *daughter's legatees* prosecuting the executors, and those who had obtained assignments of effects from the executors. (Scott v. Tyler, 2 Dick. 712. Bonney v. Ridgard, 1 Cox, 145.)

Dickenson v. Lorkyer is this very case, as to the plaintiffs. That was a bill filed by the administrator *de bonis non*, and a particular legatee, against a trustee under the will, and another who had obtained a discharge of his bond from the trustee *bona fide*, but without actual payment. (4 Ves. 35.)

The remaining objection, that the proper and necessary parties are not made defendants, appears to me, at least to a certain extent, well taken.

[1] Oglesby v. Gilmore, 5 Geo. B. 56. Heffernan's adm'r's. v. Gryme's adm'r's. 2 Leigh, 512, 525. Coleman v. McMurdo, 5 Bandal. 51. Hagthorpe v. Hook's adm'r's. 1 Gill. & John. 270. See also 1 Kelley, B. 80. 3 id. 284. 1 Ventr. 275. Freeman, 462, Bac. Ab. tit. ex'r's. b. 2. 1 Salk, 206.

The question of who are proper and necessary parties, so constantly recurring in the proceedings of this court, has never yet been solved by any rational and plain rule of discrimination. It is clear, the general proposition, that all whose interests are to be affected by the decree, must be before the court, gives but little definite instruction; for it still rests uncertain what degree of remoteness of interest will excuse bringing in parties, or prevent their uniting.

The well established exception of creditors and legatees excludes a wide class, who all have material connection with the subject matter in suit, and is so broad in its operation as to render the rule senseless or nugatory in a great variety of its applications.

The subject has been maturely considered in England and this country, and the difficulties of fixing a rule which shall be precise, yet invariably accurate, have been found so multiform and serious that the courts, after attempting to bring innumerable special cases under some common principle, have in the end concluded, as Lord Eldon expresses himself, "that it must be a point always to be modified by the court according to the exigencies of the case;" or, as Chancellor Kent puts it, to "leave the question to the discretion of the court, that usually being governed by considerations of expediency;" or, as chief justice Marshall expresses it, "the rule addresses itself to the policy of the court—it is framed by the court itself, and is subject to its discretion;" or, as Mr. justice Story, who reviews with great discrimination all the important cases then extant, says, "the rule is not so inflexible that it may not fairly leave much to the discretion of the court." (*Cockburn v. Thompson*, 16 Ves. 325. *Wise v. Blackly*, 1 John. Ch. Rep. 437. *Elmendorf v. Taylor*, 10 Wheat, 167. *West v. Randall*, 2 Mason's Rep. 181.)

Yet whether this direction be absolute, such as to pass upon each case, as *novæ impressionis*, or is only exercised in points of expediency, touching the numbers or residence of parties; it has in no approved book been applied to retaining a party defendant, who palpably has no interest in the subject of litigation, and disclaims all connection with it.

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Is the defendant so circumstanced ?

The defendant stands in the relation of debtor to the estate ; and if proceeded against in that character by the legatee solely, the bill would be dismissed, unless clear proof was produced that he had collusively arranged his debt with the executor. Lord Eldon says, "that sort of bills are maintained on the ground of collusion alone." (*Doran v. Simpson*, 4 Ves. 664.) In the note to *Elmslie v. M'Auley*, (3 Bro. C. C. 627; Eden's ed.) many cases are collected, establishing the principle that a creditor or legatee cannot make a debtor to the estate a party, unless there be collusion, "insolvency or some special case. *Crane v. Drake* was a case of collusion. *Burroughs v. Elton*, in of its features, was a suit against a debtor by a creditor of the estate, the executor being insolvent and unwilling to act. (11 Ves. 34.) *Berkley v. Dorrington*, decided by Lord Hardwicke, considers collusion and insolvency, the special cases permitting this form of redress ; but Lord Eldon, in citing and approving that case, carries the doctrine to other instances, as it is also accepted and applied in this court. (*Alneger v. Rowley*, 6 Ves. 748. *Long v. Majestre*, 1 John. Ch. Rep. 305.)

The argument for the defendant assumes, that he is responsible to the representatives of Le Roy solely, and that a recovery of them by the defendant would be for the benefit of the plaintiff.

That is the usual course of proceeding, and it is quite plain that this court may require executors to collect the assets in behalf of creditors, and will control the proceedings in case of a reluctant or insolvent executor, and under fit circumstances appoint a receiver to guard the rights of creditors. (*Ulterson v. Main*, 2 Ves. jun. 94.) But apart from the circuitry of this mode of proceeding, which a court of equity will always endeavor to avoid, (1 Com. Dig. 226, H.,) and in the simplest manner practicable render persons ultimately responsible, immediately so in behalf of creditors, (*Riddle v. Mandeville*, 5 Cranch, 322,) it might be attended with important disadvantages to the plaintiffs.

For should the court direct a suit by the representatives

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of Le Roy against the defendant, it would thereby treat the transactions as a *bona fide* loan by one of the co-partners for the business of the firm, and the recovery *might* be subject to a full accounting upon the partnership dealings, and depend upon the eventual balance. It might prove in the result that Mr. Le Roy was in arrears to the concern to the full amount of the loan.

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The complainants ought not to be exposed to such contingency ; and it clearly appearing that the defendant has in his possession some of the effects of the estate, they may well maintain their bill directly against him alone, for the discovery and payment of the amount. Such is the governing *principle in *Long v. Majestre*, (1 John. Ch. R. 305.) This must, however, be limited to the monies received by him since the death of Mr. Le Roy, the executor.

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On the 18th of February, 1815, the defendant caused to be sold (he receiving the proceeds) \$4000 of U. S. new six *per cent.* stock, belonging to Dulary's estate. For the present value of that stock, and the dividends which might have been received since its disposition, and the interest thereon, he must account to the plaintiffs. (*Waite v. Whorwood*, 2 Atk. 159.) This stock the plaintiffs have a right to follow, as never converted by the executor, and still belonging in specie to the estate. For the residue of the demand, the claim against the defendant is as the survivor of Jacob Le Roy & Son.

It must be borne in mind that the original indebtedness of the copartnership was not directly with the estate of Dulary, but mediately, through Jacob Le Roy, his executor or trustee.

Dulary, in his lifetime, might probably at his election have maintained his action against the firm for the monies they had received, upon the implied assumpsit ; or, against Jacob Le Roy alone, upon his direct undertaking.

But in this court, all the features of the relationship are disclosed, and to be acted on ; and the plaintiffs are not necessarily entitled to recover of the defendant the extent of their demand against Le Roy ; and he, in no event, ought to be responsible for more than that.

The account then, to be taken, in consequence of the

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decision of this court, must necessarily be with the co-partnership of Jacob Le Roy & Son, upon the footing of the responsibility of that concern to the executor of Dulary's estate, to an amount, however, not beyond the just claim of the estate upon the executor. For the house will not here be required to pay more than the complainants could collect of the executor. To decree the whole demand against the concern, might be highly unjust; as when the defendant turns round to the representatives of Mr. Le Roy for a contribution, they may be enabled to show a much less amount in arrear to Dulary's estate.

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*It is accordingly manifest, that the account against the defendant, representing the co-partnership, would be carried on under great embarrassment and inconveniency, without joining the representatives of Jacob Le Roy; and moreover, that the court could not pronounce a decision on such accounting that would be final, in regard to the rights of either party.

Should it appear in this case, that the firm had actually and *bona fide* repaid any portion of the monies to the executor, such amount must be deducted from the recovery here; but the representatives of Jacob Le Roy would not be excluded thereby from afterwards preventing the plaintiff's recovering of them, by controverting and disproving the fact of such re-payment to the executor.

And thus, where a real deficit existed, the plaintiffs might be barred collecting it by means of a decree of this court, freeing each party separately from its payment, when the recovery would have been certain and easy, had the proceeding been against all parties at the same time.

The prejudice to the defendant in carrying on this cause, without joining the representative of Jacob Le Roy with him, would be more probable, because he loses all the advantage and protection of the executor's individual account against the estate. Whatever that may be, it ought to apply to the credit of the house, and go in diminution of this claim. And besides, he is to look, for any excess, beyond what the concern ought to pay, to a partner, who is represented by both parties to be insolvent.

These considerations render it important, that the ac-

count should now be taken in a way to conclude the rights of all parties; and so that, if practicable, the court may impose the burthen according to the equitable liabilities of the respective parties.

The strong probability is, that the partnership books exhibit all the credits the executor can substantiate against the estate. The court cannot, however, assume that fact. They do not conclude the representatives of Mr. Le Roy from showing greater credits. And they are no admission, by the *defendant, of the state of Mr. Le Roy's individual demands upon the estate.

It is apparent that the state of the executor's account with the estate, becomes an important consideration in the case. That the defendant cannot exhibit; and without submitting to be charged for the balance on the books, he had a right, in behalf of the partnership, to require the cause to be so framed, in respect to parties, as that the executor's accounts might be adjusted, before the liability of the firm was fixed; (*United States v. Howland*, 4 Wheat. 108;) and he is in time with the objection of a want of proper parties at the hearing, after answer and proofs, (*Harding v. Handy*, 11 Wheat. 103,) and need not plead that matter in abatement.

Formerly bills were dismissed when the proper parties were not brought in. (1 Harr. Pr. 29, note L.) The practice in England and in this country is now, to order the cause to stand over, that the necessary parties may be added. [1] (*Milligan v. Millage*, 3 Cranch, 220. *Harding v. Handy*, 11 Wheat. 163.)

I shall accordingly order this cause to stand over, to the end that the representatives of Jacob Le Roy, deceased, may be made parties defendants, but without costs, as the defendant might have taken the objection preliminarily, by plea or demurrer. (*Mitchell v. Bailey*, 3 Mad. Rep. 61.) Or at the election of the complainants, let a decree be entered against the defendant solely, for the \$4000 U. S. six

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[1] Anon. 9 Atk. 14. *O'Bryen v. Heeney*, 2 Edw. 242. *Van Epps v. Van Dusen* 4 Page 64. *Nash v. Smith*, 6 Conn. 422. See further *Am. Ch. Dir. by Waterman, tit. Parties* *Court v. Jeffrey*, 1 Sim. & Stew. 105.

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per cent. stock, and a reference be had to the master, to state the value at the time of his report; (*Harrison v. Harrison*, 2 Atk. 121; *Hart v. Ten Eyck*, 2 John. Ch. Rep. 119; *Bowlet v. Herbert*, 1 Ves. Jun. 297;), the defendant to replace the stock, or pay such value, with the dividends from the time of its transfer, and interest on the dividends. The same rule of damages obtains at law. (2 East, 211. 2 Taunt. 257.) Complainants to recover costs.

Decree accordingly.

Subsequently, a supplemental bill was filed by the complainants, making Peter A. Jay, administrator of J. Le Roy, deceased, a party, and praying relief against him.

The administrator filed his answer, admitting the allegations in the bill, and submitting to the decree of the court.

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*The cause being again placed upon the calendar, and a reference to a master, to take an account upon the basis declared in the above opinion, being moved, the court, at the sitting, January 23, 1827, ordered the same accordingly.

D. B. Ogden, for the appellant, contended that the house of Le Roy & Son were to be considered the mere agents or bankers of Le Roy, the executor, and were accountable to him only; and that they had accounted, the balance of moneys in the house being, by order of Le Roy, the executor, charged to his individual accounts.

J. I. Roosevelt, for the respondents.

The discussions of counsel were confined almost exclusively to the evidence in the case bearing upon the points taken by the appellant.

Facts conceded.

SAVAGE, Ch. J. There are certain facts in this case about which there is no dispute. These are, that Dulary, in his life time, had money in the hands of J. Le Roy & Son. That at the death of Dulary, Le Roy was appointed executor, together with Mrs. D'Aitz. That Le Roy alone proved the

will, and took possession of all the property ; and that the estate went into the firm of Le Roy & Sons, who opened an account with, transacted the business, and used the funds of the estate, as part of their capital. And it seems to be admitted, that if this state of facts had existed at the death of Le Roy, then the firm must be held accountable to Dulary's representatives. Whether conceded or not, such must undoubtedly be the consequence.

The important fact in dispute is, whether the firm of Jacob Le Roy and Son accounted with J. Le Roy, the executor, in his life time, and transferred to his private account the funds in the hands of the firm ; and the important question of law is, whether such accounting and transfer upon the books, without an actual payment of the funds themselves to the executor, discharges the firm from the claims of Dulary's representatives.

*1. As to the fact : Was the transfer ever in fact made in the life time of Le Roy, and with his assent ? The allegation comes from the appellant in his answer, and is not responsive to the bill. The appellant must therefore prove the fact, or he can claim no benefit from it.

The only evidence consists of the testimony of Gordon, who states that the account was written up before the middle of January, 1815 ; and Le Roy's knowledge is an inference from the fact that the books were carried to his house every night for safe keeping, and that he attended his counting-house almost daily till his death. The account is written in the hand-writing of the appellant Colt ; and Gordon swears that Colt was in New York in the month of December, 1814, and thinks he was there also in November, and in January, 1815. His cross-examination, however, shows that he has no distinct recollection about it, and presents facts, as to the letter-book, and as to Le Roy's signing notes, which render it very doubtful whether Colt was in fact in the city at the times when Gordon supposes he was.

The testimony of Roulet, and several exhibits, go strongly to prove that Colt was not in the city of New York in the month of December, 1814, or in January, 1815, till the

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31st, but in Baltimore, where he resided. He is then shown to have been absent early in February; and till he was sent for on account of the death of Le Roy. The character of the books themselves kept by Colt, is attacked by other testimony, and it is proved that several of the entries could not have been made when they purport to have been entered. All these circumstances, together with the want of certainty and precision in Gordon's testimony, which appears upon his cross-examination, and with the admitted fact that after the death of Le Roy, and on the 20th of February, he, in the name of the firm, transferred to himself certain stocks belonging to Dulary's estate, render it at least doubtful, whether the books were written out, and the account of Le Roy stated in his life time. It was the duty of Colt to have established, beyond a reasonable doubt, the fairness of the transaction. At the death of Le Roy, he must have known the importance of proving this account correct, unless, indeed, he thought as *C. P. White testifies he stated to him, that this estate would never be called for. It was in his power then to have put the matter out of dispute. He has failed in my judgment, to prove what is necessary to exonerate him from the liability which once rested upon him, and of which he seems to have been sensible.

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Fact of accounting with executor not proved.

How it would be if the accounting had been proved.

I am of opinion, therefore, that the appellant has not proved the fact, asserted by his answer; that he had accounted with the executor of Dulary's estate.

2. But suppose the fact to be precisely as he states it; that the account was closed by directions from Le Roy, as executor, in the life time of Le Roy; does it follow that he is discharged from the claims of the respondents?

The power of an executor over the assets of his testator and his right to appropriate them to the payment of his own debts have often been the subjects of judicial enquiry.

The cases.

The first case I shall notice is, *Humble* 3. Bull, (2 Vern. 444, A. D. 1703.) By the will in this case the executor was to raise £2000 for the testator's daughter, out of the profits of a printing office, in which the testator held a term of 21 years. The executor first mortgaged, and then assigned

the term for £1800. It was insisted, that there was no necessity of selling to pay debts, and Humble, the purchaser, having notice of the will, must take it subject to the £2000. The court was of opinion, that the executor might sell as he should judge necessary; and if a specific or residuary legatee was injured by such sale, a remedy existed against the executor, but not against the purchaser. This decree was reversed in the house of Lords; they, of course holding that the legatee had a remedy against the purchaser, who had notice of the wrongful act of the executor. [1]

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Crane v. Drake, (2 Vern. 616, A. D. 1708,) was the case of a creditor of the testator against the purchaser from the executor. The consideration of the purchase was £200 due from the testator, £550 due from the executor, and £150 in cash. The purchaser had notice of the plaintiff's debt. The plaintiff had a decree in his favor at the rolls, which was affirmed on appeal to the lord chancellor, upon the ground *that the defendant was a party consenting to, and contriving a *devastavit*.

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The next case is *Nugent v. Gifford*, (1 Atk. 463, A. D. 1738.) There the executor assigned, in payment of his own debt, a mortgage term held by certain trustees for the benefit of the testator. The plaintiff, who purchased from the executor, claimed to have the benefit of his purchase as against the daughters of the testator, who were creditors by virtue of a marriage settlement. Lord Hardwicke decreed in favor of the plaintiff. He said, at law the executor has power to alien the assets of the testator; and no creditor can follow them. The demand of the creditor is personal against the executor, in respect of the assets in his hands; but no lien on the assets. If the alienation is not fraudulent, and is for valuable consideration, this court suffers it as well as at law; and the reason he gives is, that a purchaser from an executor has no power of knowing the debts of the testator. He states the third objection to have been, that it was a *devastavit*, because the consideration was a debt of the executor's own; in answer to which, he ob-

[1] But see *Wilson v. Moore*, 1 M. & K. 337.

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serves, there is no difference between this and the money paid down, provided it be done *bona fide*. A sum of money *bona fide* due, is as good and valuable a consideration as any. The lord chancellor cites *Crane v. Drake*, without expressing any dissatisfaction with it; and adds, here was no notice of any debts due from the testator, and this was a debt under a settlement, which was a private transaction in a family. Although, therefore, broad principles were laid down, yet the decision, rested on the want of notice in the purchaser of the creditor's debt.

This case has been much remarked upon by subsequent jurists. Lord Alvanley, the master of the rolls, in *Andrew v. Wrigley*, (4 Br. C. C. 137,) states, that the executor was also residuary legatee; and says, it was not necessary for a purchaser from the executor and residuary legatee, to enquire whether the debts were paid.

The case of *Mead v. Lord Orrery*, (3 Atk. 235, A. D. 1745,) came before lord Hardwicke, a few years afterwards. The plaintiffs were residuary legatees of old John Mead. They claimed from the defendants the avails of a certain mortgage, belonging to his estate, and which had been assigned by the executors, of whom young John Mead was one, as a security for his conduct as receiver of the estate of the duke of Buckinghamshire. The defendants insisted that John Mead, the younger, died indebted to the estate of which he was the receiver, and that the defendants were entitled to have out of the mortgage the amount due from him; and averred, that the executors had the power to assign the mortgage. Lord Hardwicke discussed the case at some length; and concluded that there was no pretence for setting aside the assignment, as the executors had the legal right, and there was no color of fraud; that as two executors joined in the assignment who had no interest, and there was a purchase for valuable consideration, it ought not to be affected by an account to be taken of assets in favor of residuary legatees.

In *Taner v. Ivie*, (2 Ves. Sen. 466, 9,) the same question came again before the same learned chancellor, where he took occasion to speak of the general principles contained

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in the preceding cases. Among other things, he says, "If there is collusion between an executor and another person, as to paying one part of a testator's estate into the hands of that other, both would be liable to make satisfaction; but at the hearing, no such fraud or collusion was made out, as was sufficient to charge Hull, (the assignee of the mortgage) and make him answerable, which was the ground of my determination; not upon any general principle, that an assignee, or person taking security for an estate from an executor is not to be answerable. I do not know that there can be any such principle in these cases. They all depend on circumstances." He then states that the case of *Nugent v. Gifford* was founded on *Crane v. Drake*, where there was a contrivance between the executor and assignee to make a *devastavit*; but the cases before him did not come up to it. What is said here, Lord Eldon considers a retraction of the broad principles previously advanced. (17 Ves. 164.) Lord Hardwicke, he thinks, was startled at the extent of his own doctrines. The doctrine of *Nugent v. Gifford*, received the approbation of Lord Mansfield in *Whale v. Booth*, (4 T. R., 625, n.) where he holds, that the power of the executor over the testator's effects is absolute, with one exception; when a contrivance appears between the purchaser and executor to make a *devastavit*. That case was much qualified by *Far v. Newman*, if not overruled by the same judges who decided *Whale v. Booth*, with the exception of Lord Mansfield, whom Lord Kenyon had succeeded. But in the court of chancery, the cases of *Nugent v. Gifford*, and *Mead v. Orrery* have not been supported, in their full extent, by any case that I have seen; and in *Taner v. Ivie*, Lord Hardwicke himself qualifies them. [1]

The case of *Bonney v. Ridgard*, (1 Cox, 145, A. D. 1784), came before Sir Thomas Sewall, and afterwards before Lord Kenyon, master of the rolls. The testator devised his estate to his wife and three daughters, and appointed his wife executrix. She married Ridgard, and he and his

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[1] See also, *Wilson v. Moor*, 1 M. & K. 337, per Lord chancellor.

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wife mortgaged the premises, and afterwards assigned the equity of redemption, the consideration of which was principally a debt due from Ridgard, to the purchaser Barnard. The sale was in 1752, and no bill was filed till 1783. Lord Kenyon decided against the claim, on the ground of lapse of time; but expressed his opinion on the merits. He says nothing can be clearer, than that an executor may go to market with his testator's assets; and that, in general, a purchaser will not be bound to see to the application of the money; [1] but common honesty requires, that if there is either express or implied fraud, the parties shall not avail themselves of it. Then, as to the facts of the case, he states the consideration for the assignment; and adds, "this satisfies me that this money was not raised for fair, legal purposes. The fund in the hand of the widow was applicable to the payment of debts, and after that, to certain defined purposes declared by the will. Barnard (the purchaser) had full notice of the will. He knew that after the debts were paid, this fund ought to be so applied, and he therefore connived at its being misapplied." In a note to this case are found the rules which are supposed to govern this question at the present day, to wit: a party dealing with the executor is responsible if any way conniving at his breach of trust. As a general rule he does not become a party to the fraud by buying or receiving the assets as a pledge for money advanced at the time; and as a "general rule, he is such party by buying or taking them in pledge in satisfaction of an antecedent debt of the executor. There are exceptions to both rules.

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The same question was agitated in *Scott v. Tyler*, (2 Dick. 725,) where Lord Thurlow's opinion is fully expressed, that the title of a purchaser from an executor, of his testator's

[1] "The General rule," says Lord Lyndhurst, "as to which there is no dispute, is this: where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase money. Where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase money." *Johnson v. Kennett*, 3 M. & K. 624. Overruling *S. C.* 6 Sim. 384.

assets, is complete by sale and delivery, and what becomes of the price is no concern of the purchaser ; but fraud and covin will vitiate any transaction. If one concert with an executor or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value. As to what shall amount to fraud, Lord Alvanley asks, (4 Br. C. C. 137,) can there be a stronger case of a *devastavit* than an executor aliening the property of his testator to pay his own debts, the alienee knowing at the time that debts of the testator were due ? This remark receives the full approbation of Lord Eldon. (17 Ves. 162.)

The only other case which I think it necessary to cite from the English books, is that of *McLeod v. Drummond*, (17 Ves. 153 to 172,) where this doctrine is very fully and ably discussed, and all the important cases are collected and reviewed. Lord Eldon manifestly considers the doctrine advanced in *Nugent v. Gifford*, *Mead v. Orrery*, and *Whale v. Booth*, to be unsound and untenable. Upon *Whale v. Booth* he remarks, that he is not prepared to follow even Lord Mansfield. He cites with approbation the remark of the master of the rolls, in *Hill v. Simpson*, (7 Ves. 152,) that for the first time he was of opinion, that a general pecuniary legatee had a right in equity to follow the assets. He adds, the case of a residuary legatee is stronger than that of a pecuniary legatee. He has, in a sense, a lien upon the fund ; and may come here for the specific fund. If it is wrong as against a creditor, for the executor to apply the fund in payment of his own debt, why is it not equally wrong, both in law and equity to allow a third person, wilfully and fraudulently, to take from the executor that money, which, in his hands, the residuary legatee can call for as a specific property of the testator ? The whole scope of his argument is, to prove that the purchaser, or banker who receives the property of the testator

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from the executor, knowingly for purposes inconsistent with his duty as executor, is responsible for such property to the creditors or the persons in interest.

This subject was briefly discussed by the late Chancellor Kent, (7 John. Ch. Rep. 21,) where he seemed inclined to adopt the cases of *Mead v. Orrery*, *Whale v. Booth*, and *Nugent v. Gifford*, though they are certainly considered as overruled in England. But in *Field v. Schieffelin*, (7 John. Ch. Rep. 150,) he goes into a more full examination of the cases, and observes, they all agree in this; that the purchaser is safe if he is no party to any fraud in the executor and has no knowledge, or proof that the executor intended to misapply the proceeds, or was in fact, by the very transaction, applying them to the extinguishing of his own private debt. The later and the better doctrine is, that in such case he does buy at his peril; but that if he has no such proof or knowledge, he is not bound to enquire into the state of the trust, because he has no means to support the enquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust. This is precisely the doctrine of Lord Tharlow, Lord Kenyon and Lord Eldon, and also of Chancellor Dessausure. (4 Des. 526, 7.)

Any person receiving assets from an executor knowing the disposition made by the executor to be a violation of his duty as such, is accountable to the person injured by such disposition.

It seems to me, therefore, the correct rule, both in England and in this state, is, that any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor; and that such person is responsible for the property thus received, either as a purchaser or a pledgee. The payment by the executor, of his own private debt, with the assets of his testator, is considered clearly a *devastavit*, both by Lord Alvanley and Lord Eldon. [1]

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*Upon this principle, the firm of J. Le Roy & Son continued responsible for the estate of Dulary, in their hands,

[1] *Cheek v. Watkins*, 2 Simon & Stew. 199. *Cutbidge v. Boatwright*, 1 Eus. Ch. Cas. 649. *Pannell v. Hurley*, 2 Coll. 241. *Wilson v. Moore*, 1 M. & K. 337. *Keane v. Roberts*, 4 Madd. 357, 358, per Sir J. Leach. *Eland v. Eland*, 4 M. & Cr. 427, per Lord Cottenham

notwithstanding the transfer, even if done by Le Roy himself.

According to the cases referred to, the receiving of the assets belonging to the estate, in payment of a private debt of the executor, was an act of connivance and collusion to make a *devastavit*, even if the appellant then thought Le Roy solvent. But when we consider the facts in the case showing that he must have been conscious of the fact of Le Roy's insolvency, particularly his declaration to Mr. Jay, that the house was insolvent when he came into it; and as he had kept the books himself, and could not but know their then situation, there is no room left to doubt that he knew the transfer which is set up, if sanctioned, deprived Mrs. D'Aitz of ever realizing any part of her property from Le Roy.

In conclusion, therefore, I am of opinion, that the decree made by the court of chancery be affirmed; 1. Because the appellant has failed to show that the transfer of the account was made in the life time of Le Roy, and by his consent and direction; and 2. If it was so, and the transfer of the account was equivalent to a transfer of the funds, still, under the circumstances of this case, Colt was not discharged from his liability to the residuary legatee. This case then is precisely that in which, by the latest decisions both English and American, the residuary legatee has a right to pursue the assets in the hands of the purchaser.

WOODWORTH and SUTHERLAND, Js., concurred: and

Per totam curiam,

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Le Roy &
Son come with
in this prin-
ple.

Decree affirmed.

Decree affirm-
ed.

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*ELIZABETH SEBRING, appellant,
— against

DAVID MERSEREAU AND OTHERS, respondents.

A court of equity will not compel a purchaser to take a doubtful title; as on a bill for specific performance, or a sale on foreclosure of a mortgage. But the rule does not apply to a sale decreed upon a bill for partition.

Judgment creditors and other encumbrancers are not proper parties to a bill for partition, even where a sale of the premises is decreed; and where they were made parties, in such case, by a supplemental bill, *held*, that the bill should be dismissed.

An insolvent law of one of the United States which discharges the person and future acquisitions of a debtor, is constitutional and valid as to contracts made between citizens of such state subsequent to the passing of the law.

ON appeal from the court of chancery. The appeal was from that part of the decree which affirmed a decree of the circuit court, dismissing a supplemental bill filed to bring in judgment creditors in partition. For particulars, *vid.* 1 Hopk. Ch. Rep. 501, S. C.

SANDFORD, late chancellor, assigned the reasons for the decree, as in 1 Hopk. Ch. Rep. 502 to 505, S. C.

Talcott (attorney-general,) for the appellant.

G. Griffin & H. W. Warner, contra.

A court of equity will not compel a purchaser to take a doubtful title; as on a bill for specific performance, or sale on foreclosure, &c.

But the rule does not apply to a sale on a bill for partition.

SAVAGE, Ch. J. (after stating the facts.) The appellant contends, that, as a purchaser, she ought not to be compelled to take a doubtful title. That proposition is undoubtedly correct in a proper case. Upon a bill for a specific performance of a contract for the sale of real estate, there is no doubt that a court of equity will avoid compelling a purchaser to take a doubtful title. So also of a purchaser under the foreclosure of a mortgage, and analogous cases. But in partition generally, and in this case particularly, there is no dispute as between the parties about the

title. [1] Their rights are determined when the order for partition is made. Suppose actual partition might have been made in this case ; no "notice could have been taken of incumbrances. Each takes the share allotted to him, and subject to such liens as exist upon it. The business of the court, in this simple suit, is not to draw into discussion various and conflicting rights and equities of incumbrancers. The property is divided *cum onere*.

In England the property is always divided unless a compromise takes place. No power exists there to order a sale of the premises. Here the sale is a statute regulation ; but I apprehend, that was intended to facilitate the object of the suit ; not to embarrass the proceedings by drawing into discussion matters unnecessarily connected with it.

The respondent, Mersereau, contends that the judgment creditors ought not to be made parties ; and, I apprehend, the true rule is, that no persons are to be made parties except those who have a present interest in the premises. [2] Hence in *Barring v. Nash*, (1 V. & B. 550,) it was decided that partition might be made between tenants for life, without making the owner of the inheritance a party.

In conformity with this principle, it was held by Chancellor Kent, in *Wotton v. Copeland*, (7 John. Ch. Rep. 140, '1,) that mortgagees and judgment creditors cannot be compelled to join in such a suit. (a) In that case they were joined ; and the bill prayed for partition or sale, and that the incumbrances might be paid out of the proceeds. The chancellor said the creditors had no concern with the par-

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mortgagees
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[1] If, however, there be a doubt in the plaintiff's title, courts of equity will leave the parties to their remedy at law. *Cartwright v. Pultney*, 2 Atk. 380. *Hosford v. Marvin*, 5 Barb. 52.

[2] *Burhans v. Burhans*, 2 Barb. Ch. R. 398-408.

(a) *Swan v. Swan*, (8 Price, 618) was a bill for partition of premises mortgaged by the common owners to a third person. At the hearing,

Matthews, for the defendant, contended that the mortgagee should have been before the court, as he was a party interested. But

Per Curiam. The court cannot make a mortgagee agree to a partition, because he is entitled to the whole.

And they made a decree on the merits, without the mortgagee being made a party.

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tion, and their rights could not be affected by it; and, as to them, dismissed the bill with costs.

On that ground the decree in this case should be affirmed.

"It is unnecessary, therefore, to say anything to the other points in the cause. But it may be observed, taking

A contract between citizens of the same state, made subsequent to an insolvent law of such state, may be discharged by such law.

the answer for true, as we must in this case, there can be nothing more clear than that the judgments are no liens upon the premises. The case is precisely within the principle decided in *Ogden v. Saunders*, (12 Wheat. 213,) that an insolvent law of a state which discharges the person and future acquisitions of a debtor, is constitutional and valid as respects contracts made between citizens of such state subsequent to the passing of the law. Here the contracts upon which judgments were obtained, were entered into after the passing of the law; and the title to the premises was acquired subsequent to the discharge. On this ground there is no pretence for calling in these judgment creditors.

I am, therefore, of opinion, on both these grounds, that the decree of his honor, the chancellor, be affirmed.

WOODWARD, J. concurred.

SUTHERLAND J. not having heard the argument, gave no opinion.

By the other members of the court, unanimously,

Decree affirmed

JOHN LANSING, junior appellant,
against
PETER GOELLET, respondent. (a)

A decree of foreclosure and sale of premises mortgaged in fee, is a complete bar of the equity of redemption, though the mortgagee become purchaser. So is a decree of sale without any express decree of foreclosure.

Where the premises, on sale, bring only a part of the mortgage debt, the mortgagee may collect the deficiency by judgment and execution on the

(a) This cause was decided October 17th, 1827.

collateral bond; and this shall not open the foreclosure, or restore the equity of redemption.

The principle and history of the practice, in this state, of selling mortgaged premises, instead of strict foreclosure; and a view of the English and *American authorities on that practice, with the statutes of New York relating to the same practice. Per Jones, Chancellor, *arguendo*, to the court of errors, in support of his decree in chancery.

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ON appeal from the court of chancery. The appellant filed his bill in the court below, stating that he had, on the 6th of September, 1810, mortgaged certain real estate in Albany to the respondent, in fee, to secure the payment of \$10,000, with a bond as collateral security. That the respondent filed his bill in chancery, praying a sale of the mortgaged premises, and payment of the mortgage debt by the avails. That on the 28th of October, 1820, an order of reference to a master was made to compute and report the amount of the mortgage debt, which he reported at \$11,581.09. That the report was confirmed; and on the 1st of November, 1820, the court of chancery decreed a sale; but made no decree of foreclosure against the appellant, which left the equity of redemption open to him. That in pursuance of the decree, a master sold the mortgaged premises at public auction, which were purchased partly by the respondent, and partly by others, at about \$6,450. That the respondent had judgment against the appellant on his bond; and after the sale of the mortgaged premises, proceeded by *a. fi. fa.* upon the judgment, to levy on other real estate of the appellant, to satisfy the deficiency.

The bill of the appellant charged that even if the chancery decree of sale had been valid, it would be opened by the proceeding upon the judgment and execution.

The bill of the appellant then prayed liberty to redeem the mortgaged premises on paying the mortgage debt, interest and costs.

The respondent demurred to the whole bill, and in August, 1826, the court of chancery dismissed the bill, with costs; and on the 28th of May, 1827, the decree of dismissal was affirmed on a rehearing.

From this decree of dismissal, the present appeal was brought.

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*JONES, Chancellor, in the court below, assigned the reason for the decree, and the reasoning below was now rendered to this court, as the ground of the decree, by

JONES, Chancellor. This is a bill to redeem a mortgage. The case is in substance this : That the complainant executed to the defendant a bond, conditioned for the payment of \$10,000 with interest, and a mortgage in fee, upon real estate in the city of Albany, to secure the payment of the debt : that default was made by the mortgagor in the payment of the money according to the condition of the bond, whereby the estate of the mortgagee in the mortgaged premises became absolute at law ; and that a bill was filed in this court by the mortgagee, upon the securities against the mortgagor and against certain judgment creditors who had obtained judgments against him, praying that the mortgaged premises might be sold by the order and decree of the court : that the bill was taken *pro confesso*, against all the parties defendants thereto : and that a decretal order was thereupon made, referring it to a master to compute the sum due upon the bond and mortgage ; and that upon the coming in of the report of the master, and the confirmation thereof, an order was made for the sale of the mortgaged premises ; but that there was no formal decree of foreclosure in the cause : that the premises were sold under the decree, and that the defendant became the purchaser of a large part thereof, and the remainder was sold to others, the whole producing about \$6,400, leaving a deficiency of upwards of \$6000.

The complainant, pending the suit on the mortgage, and before the order was made for the sale of the mortgaged premises, confessed a judgment to the defendant, in the supreme court of judicature of this state, on the bond accompanying the mortgage ; and the defendant, after the sale of the premises under the decretal order, caused a *testatum fieri facias* to be issued on the judgment, to the sheriff of the county of Schoharie ; and a levy was made by virtue thereof, upon certain lands and real estate of the complainant in that county to satisfy the deficiency. The complainant insists, that the sale of the mortgaged premises

under the decretal order of this court, was no bar to the equity of redemption; and prays to be permitted to redeem the mortgaged premises, and for general relief. To this bill the defendant has put in a general demurrer.

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Upon these pleadings, the complainant contends, that a sale of mortgaged premises under a decree of sale, without a formal decree of foreclosure preceding it, does not bar the right to redeem; or if the sale under the decree is tantamount to a foreclosure, then the debt is extinguished by the sale.

The defendant insists, that when a sale is decreed, a decree of foreclosure is not necessary; and that the omission of a decree of express foreclosure, where a sale is decreed, does not leave the equity of redemption open; and that the pursuit of ulterior satisfaction by judgment on the bond accompanying the mortgage, and execution upon the judgment, did not open the decree, or let in the mortgagor to the redemption of the mortgaged premises.

The first question then is, whether the sale under the decretal order of this court, is a bar to the claim of a right to redemption? And this question involves the inquiry, whether, by the terms of the contract, and the established principles of law, the mortgagee is obliged to extinguish the equity of redemption by foreclosure, and to take the estate in payment of the debt; or is entitled to a decree of the sale of the mortgaged premises, for the satisfaction of his demand?

A mortgage, in its origin, was in reality what it still, by the terms of it, purports to be—an absolute sale of the estate by the mortgagor to the mortgagee, subject to be determined by the payment of a given sum of money, or the performance of some other condition, within a given period of time; as by the terms of the contract, if the money was not paid, or the condition performed, by the day limited for payment or performance, the estate became absolute in the grantee. But the original character of the mortgage has undergone a change: it retains the form of a conditional sale, but has long been in substance a mere security for debt; and it must be admitted, at this day, to be intended

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by the parties, and treated *by courts of equity, as a security for the payment of a loan or debt, and not as a contract of purchase and sale. [1]

The mortgagor pledges his estate, with the intent, and in the confident expectation of redeeming it by the payment of the debt; and the mortgagee takes the pledge as a security for his money, and in the expectation of being redeemed. His object is to be secure in the re-payment of the loan he makes, or the ultimate payment of the debt he forbears; and he looks principally to the sufficiency of the security, which he will of course require to be ample. The mortgagor, knowing his intention, and confiding in his ability to pay the debt, readily agrees fully to secure it. Hence it generally happens that the value of the estate is much greater, and often more than double the amount of the money secured by the mortgage; and as a failure of the payment of the debt by the day limited by the condition of the mortgage works a forfeiture of the estate, the mortgagee, if allowed to hold his legal advantage, would thus acquire the premises for a greatly inadequate consideration. But it would be against conscience, to allow the mortgagee to prevail against the equitable right of the original owner to redeem, when the intention of both the parties was the hypothecation, and not the absolute sale of the estate; and when the loan or debt for which it was pledged, was wholly inadequate as a consideration of the purchase of the absolute interest of the mortgagor. Still, the courts of law can give no relief against the terms of the contract and the legal title vested in the mortgagee: [2] but equity, looking through the form of the contract, to its substance, and viewing the mortgage as a mere security for the debt, relieves the debtor against the forfeiture; and treating him as the equitable owner of the estate subject to the debt, allows him the right to redeem it, after it has become absolute at law in the mortgagee, upon full payment of the principle money for

[1] *Waring v. Smyth*, 2 Barb. Ch. R. 119. *Jackson v. Willard*, 4 John. 42. *Runyan v. Mercereau*, 11 id. 534. *The King v. St. Michaels*, Doug. 639. *The King v. Edington*, 1 East, 288.

which it was pledged, with lawful interest as a compensation for the delay.[1]

This equitable right to redeem, though it may not be coeval with the contract of mortgage, was engrafted upon it so early, that it has long been adjudged to form one of its properties, and to be inseparable from it. It now forms an essential ingredient of the contract, and gives to it its chief value, as a convenient, safe, and suitable security for the contracting parties. The mortgage is, in its legal form and effect, a most rigorous security; and if its legal severity was not relaxed by this equitable right, it could not be tolerated, in the present state of society in this country, as a security for debt. The courts of equity, therefore, are tenacious of this equitable title of the mortgagor to his estate, and are careful to preserve it to him, and to give him the full benefit of it for his protection. But while equity is thus watchful of the rights of the mortgagor, it forgets not the interest of the mortgagee: it gives him the full benefit of his mortgage, as a security for the faithful performance of the obligations of the mortgagor, and for enforcing the full payment of the debt, whenever he is entitled to demand it, and chooses to exert his power. Thus, the rights and obligations of the parties to the contract are respected by this court, and their equitable remedies are mutual. The mortgagor may redeem his estate whenever he pleases, by the full payment of the principal and interest of the debt,[2] without any impediment from the legal forfeiture by non-payment at a day limited by the condition, unless he is precluded by the decree of the court,[3] or suffers the lapse of time to raise a presumption to bar his right,[4] and the

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[1] Litt. Sec. 332. In New York the Court of Chancery is abolished, and equity jurisdiction is vested in Courts of Law. See Constitution of 1846. Art. 13, Sec. 13, 14.

[2] *Master of the Bolls, in Falk v. Clinton*, 12 Ves. 69. *Calkins v. Munwell*, 2 Root, 333. *Bell v. The Mayor of New York*, 10 Page, 49.

[3] Per Nelson, J., in *Patchen v. Pierce*, 12 Wen. 61. See also *Am. Ch. Dig. by Waterman*, tit. mortgage.

[4] *Rafferty v. King*, 1 Keen, 617. *Slee v. The President &c., of the Manhattan Co.* 1 Page, 48. *Hughes v. Edwards*, 9 Wheat. 489. *Elmendorf v. Taylor*, 10 id. 169. *Dexter v. Arnold*, 1 Sum. 117, S. C. 3 id. 155. *Vanick*

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mortgagee, on his part, may, at any time after the debt be comes due, and a default is made in the payment of it, according to the terms of the contract, exhibit his bill in this court against the mortgagor, and compel him to redeem by the payment of the debt, or to submit to a foreclosure or sale of the mortgaged premises for the satisfaction of it. [1]

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These principles are not seriously controverted by either of the parties; but the point at which they divide in opinion, is the right of the mortgagee to a decree upon his securities, for the sale of the estate for the satisfaction of the debt; the complainant insisting that the remedy of the mortgagee is confined to a strict foreclosure; and the defendant contending that he has his election of the remedy by foreclosure, or by a decree for the sale of the premises. And if the settled rules of law do not restrict him to the remedy by foreclosure, *it is certainly most consonant with the nature of the contract as a security for the debt, and with reason and policy, to allow him the election of a sale; and the sounder principle would seem to be, to encourage sales in preference to strict foreclosures. It is the settled principle of equity as applicable to mortgages, that the debt is the principle object of the contract, and the mortgaged premises a collateral security merely for the payment of it. The contract, therefore, and the remedies for enforcing it, are more properly governed by the principles that apply to the relation of debtor and creditor, than the rules that regulate legal titles and estates. In early times, when the mortgage was still regarded as a conditional sale of the land, rather than as a mere security for the payment of a debt, and

v. Edwards, 1 Hoff. 390. But length of time is no bar, where the mortgagee treats the mortgagor as such, or where it was agreed, he might enter, and keep possession, until paid out of the premises. *Marks v. Pill*, 1 John, Ch. 594: or where the purchaser admitted the existence of the lien, and promised to discharge the mortgage. *Park v. Peck*, 1 Page, 474. It may be rebutted by a solemn recital, and acknowledgment of the mortgage as such, in deeds &c. to third persons. *Dexter v. Arnold*, 3 Sumn. 118. There may be cases, in which, from their peculiar circumstances, a redemption will be allowed even after the expiration of twenty years, 3 Sumn. 155, 6. See also 1 Cowen & Hill's Notes, 510, 512.

† 1 2 Bl. Com., 168, 9. 2 Cru. Dig., 77-81. 4 Kent, †181.

adherence to the form of the condition in the application of the remedy of the mortgagee, was natural ; and it would necessarily lead to the decree of strict foreclosure, requiring the mortgagor to perform the condition, by paying the debt within a given time, to be limited by the court ; or to be forever barred and foreclosed of his right to redeem. [1] The effect of such a decree, it will be seen, would be, that the mortgagee would take the land for the debt ; and in a country where the laws do not permit the sale of real estate by execution at law, for the satisfaction of debts, there might be some apology for preferring the foreclosure to the sale. But in modern times, when the more liberal principle has gained the ascendancy, which deals with the mortgage as being, in its substance and legal effect, a mere security for the payment of the debt ; and in this state, where the lands of the debtor are subject to sale for the satisfaction of his debts, it would be strange indeed that a court of equity should be without the power to decree a sale of the mortgaged premises for the satisfaction of the debt, and the mortgagee confined to a decree for a strict foreclosure.

When the mortgage is the only security for the debt, and the mortgagor is not personally bound for the payment of it as sometimes is the case, the only remedy of the mortgagee for the recovery of his demand, would be to take the estate for the debt, in case the mortgagor on being called upon in equity, failed to redeem it. [2] But when the mortgagee takes the personal bond of the mortgagor for the debt, and a mortgage of real or personal estate as collateral security, which is usually the case, he is entitled to the full benefit of both securities ; and if he is compelled to come into this court to obtain the benefit of his mortgage, his appropriate remedy would seem to be, a decree for the sale of the mortgaged premises for the satisfaction of the demand ; for the mortgagee, in such cases, if that remedy is not open to him, cannot have the full effect of his securities. [3] He holds the personal bond of his debtor for the debt, and the mort-

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[1] 4 Kent, †181.

[2] See *Culver v. Slason*, 3 Comst., 264. *Elder v. Rouse*, 15 Wen. 220, 221.

[3] *Thomas v. Brown*, 9 Page, 370. But see *McCoun, V. C.*, in *Engle v. Underhill*, 3 Edw. 249. Note 1 post 154.

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gage as collateral security for the payment of it. Suppose the mortgaged premises to depreciate in value, or by some casualty to sustain damage, so as not to be worth the amount of the debt, must the mortgagee be compelled to take the estate, thus reduced in value, in satisfaction of his demand? If he is confined to a strict foreclosure, and the legal operation of such a decree is to discharge the mortgagor from the debt, he cannot enforce his mortgage without losing the benefit of the security afforded by the personal bond of the debtor. But if he is entitled to a decree of sale, all his securities will be available to him; for if the proceeds of the sale of the mortgaged premises prove to be insufficient to satisfy the debt, recourse may be had to the bond of the debtor for satisfaction.

It was admitted that the defendant might have brought a suit at law upon the bond, and have pursued that action to judgment and execution, and after exhausting that remedy by a levy and sale of such other property of the mortgagor as could be found, might in case of a deficiency in means to fully satisfy the debt, have had recourse to the mortgaged premises for the residue; and if he had the right first to proceed on the bond, against the mortgagor personally, and his general property, and afterwards to resort to the mortgaged premises for satisfaction, why is it that he might not elect first to exhaust the mortgaged premises before he had recourse to the other property of the debtor? If it would be proper to require that either security should be first exhausted, *it would seem most equitable that the first remedy of the creditor, whose debt is secured by mortgage, should be upon the mortgage against the particular estate assigned to him for his indemnity. That estate is specially appropriated to the payment of the debt, and no injustice is done to the mortgagor in applying it in the first instance to the satisfaction of the creditor. But it would be an unjust restraint of the exercise of the rights of the mortgagee, to interdict a suit upon his bond, or to postpone that remedy until the security of the mortgaged premises is first exhausted.[1] That security may be inadequate,

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[1] In New York, the Statute now provides for a decree ever against the

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and it may be important to the creditor to obtain a judgment as speedily as practicable, for the greater safety of his debt. A due regard to the just rights of the mortgagee requires that he should be allowed the full benefit of all his securities. On this principle the rule rests that the mortgagee may at the same time sue at law upon his bond and in this court upon his mortgage; and to give a substantial value to this right, he must be permitted to prosecute his suits in the two courts with effect, and to reap the fruit of both, and of either first in order without prejudice to the other, until full satisfaction of the debt is obtained. But if the mortgagee is restricted in his remedy in this court on his mortgage to a strict foreclosure, and has no right to a decree for a sale of the estate, and if the decree of foreclosure suspends the obligation of the mortgagor to pay the debt, and is opened, and the right to redeem revived by a subsequent action at law upon the bond, and if the mortgagee is not at liberty to turn the estate, by a subsequent sale, into money, and in case it proves deficient, to proceed against the mortgagor upon his personal contract for the deficiency, without waiving his foreclosure and avoiding his sale, he obviously has not the full benefit of his securities, or of his legal and equitable remedies upon them; and these restrictions upon the mortgagee in thus fettering him in his operations, must tend, in their consequences, to the injury also of the mortgagor; for if the mortgagee, in case of his electing to proceed first upon his mortgage, must submit, in the exercise of his rights, to such unequal terms, no prudent or discreet creditor will pursue that remedy when the estate is believed *to be of less value than the amount of the debt, and he has any reasonable chance of obtaining any satisfaction from other property of the debtor. Recourse would, in such cases, probably, be had, in the first instance, to an action of law, upon the bond against the mortgagor and his general estate, and the premises specifically pledged to

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mortgagor, as a substitute for a judgment at law, and takes away the remedy at law on the bond, while a bill of foreclosure and sale of the mortgaged premises is pending, 'unless authorized by the Court of Chancery.' See *McCoun, Vice Chancellor, in Engle v. Underhill*, 3 Edw. 249.

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secure the debt, though intended to be primarily applied to the payment of it, would be reserved for the satisfaction of the residue which he should fail to obtain from other sources. It would be in cases only where the mortgaged premises exceed the amount of the debt in value, the mortgagee would be tempted to elect the remedy of a strict foreclosure. But in such cases it would be manifestly inequitable and unjust to the mortgagor to permit the foreclosure, for that would be to restore the rigor of the ancient rule, and tolerate the sacrifice of the interest of the debtor to the cupidity of the creditor ; yet unless the court has the power to impose, the debtor must submit to the sacrifice. Must a court of equity then permit such an unconscionable use to be made of the security ; or must it not have the jurisdiction to administer relief by directing a sale instead of a foreclosure ?

The opposition of the mortgagee to a sale, would indeed be more plausible than that of the mortgagor ; as there is ground for contending, that the mortgagee, in default of the mortgagor to redeem, may, at his election, have the estate sold, or the equity of redemption barred, by a strict foreclosure without a sale. But that opposition and claim of the mortgagee, must often yield to the superior equity of the mortgagor in favor of a sale ; and the court is the more inclined to listen to his application, from the circumstance that the mortgagee is permitted to become a purchaser at a sale ; and the court has the power, by the conditions of the decree, to protect him from wrong or injury from the proceedings. And if the court may, when equity requires it, interpose at the instance of the mortgagor to direct a sale, when the estate is of greater value than the debt, in order to prevent a strict foreclosure to his prejudice ; so it ought, on the same principle, to extend the same relief to the mortgagee, by ordering a sale when the premises are insufficient to satisfy the demand, in order to enable him to obtain the benefit of his security, without waiving his right to claim the deficiency from the debtor's other property. Where the mortgagee has no personal demand against the mortgagor ; or where the pledge, if not redeemed, is, by the

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agreement of the parties, to be taken for the debt; a strict foreclosure would be the fit and appropriate remedy for the mortgagee, and would produce no injurious consequences to either of the contracting parties. But where the estate is pledged as collateral security merely, for the payment of the debt, a strict foreclosure would often be unjust and inequitable, disappoint the intentions of the parties, defeat the object of the security, or pervert it to unconscionable purposes, and sometimes produce the most serious injury to the mortgagor, or inconvenience and loss to the mortgagee. A sale is obviously the true, as it is sometimes the only practicable method of applying the security to the purpose for which it was intended—the satisfaction of the debt. [1] A public sale is the truest test of the value of the estate, as a resource for the payment of the demand; and to such a sale, upon sufficient notice, and under the direction of a master by whom it will be fairly conducted, neither party can justly object: it is the best mode of disposing of the property, for the interest of both. If the estate is worth more than the debt, the mortgagor will have the benefit of the surplus; and if it produces, by a fair sale of it, less than that amount due upon the bond, the debtor ought to make up the deficiency. The effect of a strict foreclosure, is to decree the estate to the mortgagee; but the creditor is entitled to the payment of the debt in money, and cannot, in justice or equity, be compelled to take the land for his satisfaction. The obligation of the debtor is, to pay the debt in money; and that obligation is not satisfied by a surrender of his equity of redemption in the estate pledged to secure it. The security is collateral, and to be applied towards the satisfaction of the debt, and not to be substituted for the payment of it. To compel the mortgagee to take the land in payment of the debt, and to submit to the loss that may accrue upon the subsequent sale of it, would be to deprive him of the full benefit of his security, and impair the obligation of his contract. A decree of sale, therefore, is the remedy which, according to the na-

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[1] It is said that the practice of foreclosing by sale prevails in all the states of the Union except three or four. *Mussina v. Bartlett*, 8. Port 288.

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ture of the contract of the mortgage as it is now understood, and upon principles of equity, and grounds of general policy as between debtor and creditor, this court would prefer to the decree of strict foreclosure, and would adopt as the general course of the court, if it possesses the right, either upon common law principles or statutory provisions, to exercise the jurisdiction; and its discretion is not bound by former decisions. [1]

But it is contended, that by the rules of the common law, the equity of redemption of the mortgagor cannot be barred or extinguished in any other way than by a decree of strict foreclosure; and that a sale and master's deed of conveyance without such a decree, though made under the decretal order of this court expressly directing them, will be ineffectual and inoperative to preclude or bar the right to redeem; and I am referred to elementary writers, and adjudged cases, as supporting these positions. On my first examination of this cause, my impressions were, that these points had been settled by my predecessors; and that the validity of sales of mortgaged premises under a decree of this court, without a formal decree of foreclosure of the equity of redemption, for the satisfaction of the debt, was conclusively established; and on that ground my decree was founded. I have, upon this rehearing, again recurred to those decisions; and I continue to consider them decisive of the question. But as the complainant insists strongly, that judicial sales of mortgaged premises are innovations, not warranted by common law principles or by statutory provisions; and that the former decisions of this court do not govern this case; or if they do, that they are so palpably erroneous, that they ought not to be followed, I have been induced to examine the subject more at large; and I have done it the more willingly, because I consider it important that the question should be definitely settled, and for ever put at rest.

[1] 2 B. S. of New York, 4th ed. 356, §60. *Nelson v. Carrington*, 4 Mass. 332. *Downing v. Palmateer*, 1 Monroe, 66. *Humes v. Shelby*, 1 Ten. 79. *Rodgers v. Jones*, 1 McCord, Ch. 221. *Paunell v. Farmers' Bk* 7 Harr & G. 202. Harr. & G. 94.

One ground upon which the decree of foreclosure was contended to be indispensable, is that the mortgagee before foreclosure, has but a chattel interest in the land; and a sale by him, can pass nothing but the chattel interest which he *possesses. The cases cited in support of this position, go to show, that a mortgage, though in fee, is held to be personal property; [1] and that the executor or administrator, and not the heir of the mortgagee, is entitled to the money secured by it. [2] And this rule results from the principle that the mortgage is a mere security for the payment of the debt. It is the money secured by the mortgage, and not the land mortgaged, that belongs to the mortgagee; and the executor or administrator of the mortgagee, necessarily becomes entitled to the security, as an incident to the debt.

But it does not follow that because the benefit of the mortgage, as a security for the debt, as long as the debt continues to subsist, belongs to the executor, and not to the heir, that the security cannot be sold at the instance of the mortgagee, under the decree of this court for the satisfaction of the debt; nor do the cases cited by the complainant establish that doctrine. It seems to be supposed by the complainant that the sale ordered by the court in such cases, is a sale of the interest of the mortgagee in the mortgaged premises, as a security for the debt. But that is a mistake; it is the land itself, and the whole estate and interest, as well of the mortgagor as of the mortgagee, that is ordered to be sold. [3] The mortgagee has competent power, by his own act, to sell and transfer his debt, and the securities he holds for the payment of it, to another without consulting the mortgagor on the subject, or applying to the court for an order to authorize the transfer. But a private sale

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[1] See *Jackson v. Willard*, 4 John. 42. *The King v. St. Michaels*, 1 Doug. 632. *Casborne v. Scarfe*, 1 Atk. 606. *Hunyan v. Mercereau*, 11 John. 534. *Dougherty v. McClogan*, 6 Gill & J. 275.

[2] *Martin v. Mowbray*, 2 Burr. 978. *Thornborough v. Baker*, 1 Chanc. Cas. 283. S. C. Swanst. 628. See also *Williams on Exec.* §575.

[3] So the interest of a tenant, under a demise from a mortgagor, made after the execution of the mortgage, is extinguished by foreclosure and sale. *Salmers v. Salins*, 3 Denio, 214.

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by the mortgagee operates only to transfer his mortgage interest to the purchaser; and the purchaser under the mortgage takes subject to the mortgage and the right of redemption. And Chancellor Kent, in the case of *Hart v. Ten Eyck*, truly observes, that where a freehold estate is held by way of mortgage for a debt, the creditor must first obtain a decree for sale, under a bill of foreclosure, before an effectual sale can be made to bar the equity of redemption. Whenever, therefore, the mortgagee comes into this court for a decree of sale, it is the sale of the pledge which he holds for the payment of his debt, the land which is vested in him as mortgagee, that is the object of his bill; and the purpose of the decretal order is to authorize the sale of that estate, and to enable the master to convey it to the purchaser. The question, therefore, is, whether the court has the power to authorize such a sale?

It is admitted that the present practice of this court is to decree a sale of the mortgaged premises, and not a foreclosure. This practice has continued so long, and been so general, that my two immediate predecessors have recognised it as the established course of the court. In the case of *Mills v. Dennis* and others, (3 John. Ch. Rep. 367,) a bill was filed against several defendants, all of whom, except one, were heirs at law of the mortgagor, and two of those heirs were infants, and the rest adults: the bill was taken *pro confesso* against the adults, and the infants appeared and answered by their guardian. At the hearing, a decree was made for the sale of the mortgaged premises; and Chancellor Kent, in giving his reasons for the order made in the cause, after adverting to the course of proceeding in England, expressly states, that the practice with us has been to sell, and not to foreclose, as well where infants as where adults are concerned; and he observed that he thought that course must generally be most beneficial to the infant, as well as to the creditor; and there can be no doubt, he says, of the authority of the court to pursue it. The reason of the special application in that case, for the order to sell, seems to have been the infancy of two of the defendants; and the directions of the chancellor show that

the questions submitted to his consideration had reference to the interest of the infants solely. One of the points related to the sale of the estate, and the chancellor gives his opinion to the effect already stated, in favor of the power of this court to sell. It may be said that he puts the right to decree the sale of the infant's interest upon the power to change the estates of infants from real to personal property, which he supposes the court to possess; and he certainly does refer to his view of the jurisdiction of the court over the estates of infants, as one ground of his opinion. But his decree embraced the shares of the adult heirs, as well as those of the infants, and he consequently could not have reposed himself solely upon the special jurisdiction, he understood himself to have, in cases of infancy; but must have acted upon the general power of the court to direct the sale.

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In the case of *Dunkley v. Van Buren and others*, (3 Johns. Ch. Rep. 380,) a decretal order directing the premises to be sold by a master, is spoken of as the usual decree of the court. And the chancellor, advertent to the remedies of the mortgagee upon his securities, intimates the opinion, that a subsequent suit upon the bond, for the remainder of the debt left unsatisfied upon the sale of the mortgaged premises, does not revive the equity of redemption; and that the English doctrine, that a subsequent suit opens a decree of foreclosure, has no application to the case of a judicial sale under a decree; thus distinctly recognising the power of the court to direct a sale of mortgaged premises, and speaking of the exercise of that power as the usual course of the court.

But the learned jurist who pronounced these decisions, is said to have expressed the opinion in the case of *Hart v. Ten Eyck*, that the mortgagee must obtain a foreclosure and an order of sale, to preclude the right to redeem.

In the case of *Hart v. Ten Eyck*, (3 Johns. Ch. Rep. 100, 101,) Chancellor Kent, in noticing the distinction between proceedings of creditors upon mortgages of real estate

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and of personal property, observes, that the creditor who holds stock in mortgage, is not bound to wait for a bill of foreclosure and decree of sale, as in the case of a mortgage of land; but may sell, on reasonable previous notice, to the debtor to redeem. And in a subsequent part of his opinion, he observes, that "if a freehold estate be held by way of mortgage for a debt, then it may be laid down as an invariable rule, that the creditor must first obtain a decree for a sale under a bill of foreclosure." These are his expressions. I do not understand them to convey the opinion that the mortgagee must obtain a foreclosure to preclude the right to redeem. It is the decree of sale on a bill of foreclosure, that it stated to be necessary. The positions are, that the mortgagee of land must "wait for a bill of foreclosure and a decree of sale," and that the creditor must first obtain a decree for a sale under a bill of foreclosure." And I understand the learned judge who advances them, to mean that the mortgagee must file his bill upon his mortgage, and obtain a decree for the sale of the mortgaged premises, before a valid sale can be made, or an effectual title given to a purchaser. Now, the bill filed by the mortgagee, to enforce his security against the mortgaged premises, whether the object and prayer of the bill be for a foreclosure or a sale, is ordinarily called a bill of foreclosure. Those terms are thus applied by Wilmot in his treatise on mortgages, and by other writers on the subject. And in the two cases of *Dunkley v. Van Buren* and *others* and *Mills v. Dennis* and *others*, already mentioned, both decided by Chancellor Kent, and in which there were decrees of sale and no foreclosures, as well as in the cases of *Brinkerhoff v. Thellheimer*, and *Campbell v. Macomb*, hereafter cited, the bills are expressly stated to have been bills of foreclosure. And from this mode of expression in those cases, and which often occurs in his judicial opinions, it is fairly to be intended, that when the chancellor spoke of a decree of sale on a bill of foreclosure, in the case of *Hart* against *Tea Eyck*, he had reference to the usual course of the court, in decreeing a sale of mortgaged premises on a

bill filed by the mortgagee upon the mortgage. In this sense of his expressions, his opinion in that case is in accordance with his subsequent decisions; and is in itself an additional authority in support of the power of the court to decree a sale of mortgaged premises, to satisfy the debt of the mortgagee. That such was the opinion of that learned judge, is apparent from his decisions, and the reasons given by him for them, as well in the cases already cited, as in those which follow.

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Thus in the case of *Brinckerhoff v. Thalhimer*, (2 Johns. Ch. Rep. 486,) on a bill to foreclose a mortgage, and which bill was taken *pro confesso*, a decree was made by him in the usual form, for the sale of the mortgaged premises, or so much thereof as should be necessary to answer the purposes of the decree.

*So in the case of *Campbell v. McComb*, (4 Johns. Ch. Rep. 534,) a decree was made for the sale of the mortgaged premises, for the payment of the debt. And in neither of these cases, does any decree of foreclosure appear to have been entered or made.

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In the case of *Perine v. Dunn*, (3 Johns. Ch. Rep. 140,) which was a bill to redeem a mortgage, a distinction is taken between a decree of strict foreclosure, and a decree of sale. The legal effect of each is briefly stated, and a decided preference given to the decree of sale, which is pronounced to be the usual course of the court. Treating of the terms of redemption allowed the mortgagor on a bill to foreclose, the chancellor observes, that, the rule and practice, of which he speaks, apply only to cases of strict foreclosure, when, by the decree, the equity of redemption is barred, and the complete title is vested in the mortgagee. The rule, he says, does not apply to cases of decrees for the sale of the mortgaged premises, *according to our usual practice*. The mortgagor, in such cases, he observes, is not subjected to a severe and absolute forfeiture of all his right; but he has a chance of the surplus moneys arising from the sale, and is placed upon the same footing of equality with debtors against whom judgments are rendered, and executions awarded at law.

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In the case of *Kershaw v. Thompson*, (4 John. Ch. Rep 609,) there had been a sale of the mortgaged premises under a decree of the court in the cause; and the application was by the purchaser, to be put into possession of the premises, which were withheld from him by the wife of the mortgagor. The decree under which the petitioner purchased was in these terms: "That the rights of Thompson and his wife be sold by a master, and that he execute a deed to the purchaser, and bring the purchase money into court." And the chancellor, in his opinion, states, that a bill to foreclose the equity of redemption, is a suit concerning the realty and *in rem*; and the power that can dispose of the fee, must control the possession. The parties to the suit are bound by the decree: their interests and rights are concluded by it; and it would be very *unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court.

These decisions of Chancellor Kent, with his exposition of the grounds of them, most clearly show him to have held a decided opinion in favor of the jurisdiction of the court to direct a sale of the mortgaged premises, instead of decreeing a strict foreclosure; and that he considered a decree of sale to be the usual course of the court.

The same opinion was entertained by the late chancellor. In the case of *Bridgen v. Carhatt*, (1 Hopkins, 234,) the complainant, holding two mortgages against the defendant upon distinct premises, filed his bill upon his mortgages, to obtain satisfaction of his demands. A sale was decreed; and one of the mortgaged tracts being insufficient in value to pay the sum charged upon it, and the other mortgaged tract exceeding in value the debt for which it was mortgaged, the complainant asked the court to direct that the excess arising from the sale of one of the mortgaged tracts, beyond the sum with which that tract was charged, should be applied to satisfy so much of the debt secured by the other mortgage, as might not be received by the sale of the premises thereby mortgaged. The application was refused: and the chancellor, in the course of his reasoning on

the subject, observes, that "the situation of the complainant in respect to the debt secured by the inadequate mortgage, was that of any other mortgage creditor, where the land is of less value than the sum for which it is mortgaged; that the mortgage is a specific incumbrance upon the land for the debt, but that the bond binds the debtor for the whole debt, whether the land is a sufficient or an insufficient security; and that the remedy of the complainant for that part of the debt which is not obtained from the land, is upon the bond."

This case appears to me to fully warrant the conclusion, that the chancellor who decided it, held the opinion that the mortgagee has the right first to exhaust his security by a sale of the land; and if his debt is not fully satisfied by the proceeds, to pursue his remedy on his bond for the deficiency. For it is obvious that the mortgaged premises must first be sold, and the avails applied towards the payment of the debt, before the remedy can be had upon the bond for that part of the demand which is not obtained from the land. [1]

But if any doubt could remain of the opinion of Chancellor Sandford on the subject, the question is put at rest by the case of *Sedgwick v. Fish*, (1 Hopkins, 594,) in which he expressly declares, that the sale of mortgaged premises under decrees of this court, has long been an established practice; and that the proceeding is, in effect, an execution for the mortgage debt against the mortgaged land. But that the ancient practice, of a decree of a foreclosure of the equity of redemption, without a sale, has not been abolished; and that the mortgagee may still take a decree for a mere foreclosure. Thus, it is seen that Chancellor Sandford expressly recognised the sale of mortgaged premises, as the well established and long settled course of the court; and regarded the decree of strict foreclosure as an ancient prac-

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[1] Although there has been a variety of judicial dicta, the better opinion seems to be, that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency; see 4 Kent, †183. See also *Perry v. Baker*, 8 Vesey 527. *Hatch v. White*, 2 Gallis. 152. *Omaly v. Swan*, 3 Mason, 474. *Cullum v. Emanuel*, 1 Alab. 23.

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tice, which had been disused, though not abolished, and which the mortgagee, though at liberty, is not bound to pursue.

It was intimated that Chancellor Sandford merely conformed to the practice of the court as he found it, and never gave the sanction of his authority to the principle on which it rests. No case appears to have come before him, in which the jurisdiction was directly drawn in question; but from the continual exercise of the power during the time he sat in the court, and from his recognition of the practice as the course of the court, expressing no doubt of the principle it involved, but alluding to it, as he did in the two cases to which I have referred, with manifest approbation, he must be understood as giving it his sanction; and his opinions thus judicially pronounced, want nothing but the form of an express decision on the point, to give them the weight of authority.

But the case of Lansing against the Albany Insurance Company, (1 Hopkins, 102,) was a direct decision upon the point. It was a bill of review, seeking to reverse a prior decree of the court for the sale of mortgaged premises, as erroneous, on the ground, amongst other reasons, that it is contrary to law to decree a sale of lands mortgaged in fee. The defendants demurred to the bill. The chancellor being a stockholder in the Albany Insurance Company, declined to hear the cause, and it was heard before the chief justice, who being of opinion that the sale was legal, and that the other objections to the decree were untenable, allowed the demurrer; and in his reasons for his decree he declared that sales on mortgages in fee have been directed by this court since its first organization, or at least since the passing of the statute authorizing sales on mortgages, and that at present such sales are expressly authorized by statute.

It is alleged that the chief justice was incorrect in supposing that the court was in the practice of decreeing sales of mortgaged premises at so early a period as the passage of the act to which he refers. But without tracing the practice to its origin, it is sufficient to say, that the act now

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in force recognising the jurisdiction, and authorizing sales by masters, was passed in 1813, at which time it is believed that the court was in the constant exercise of the power: and the case of De Labigarre and wife, v. Bush, furnishes an example of such a decree at a much earlier period.

In the case of De Labigarre and wife v. Bush, (2 Johns. Rep. 490,) an order was made in 1806 for the sale of the mortgaged premises to satisfy the debt: the cause was much litigated, and the order was appealed from, and modified by the court for the correction of errors. It was a cause of great interest, involved important points, and was contested by some of the ablest counsel then at the bar; and yet no question was made of the power of the court to order the sale. But it was assumed to be within the acknowledged jurisdiction of this court; and the court of the last resort, in modifying the decree, acted upon it as in the usual course of the court of chancery. It must, *therefore, have been the understanding of the judges of both courts at that day, that the decree for the sale of mortgaged premises by this court, was within its powers.

It was suggested that this cause arose under the act then in force concerning the absent mortgagors, and that it is to be regarded as an exception to the general rule, and the decree of sale as authorized by the special provisions of that act. I see no evidence on the face of the case as reported, to show it to have been the case of an absent mortgagor. The bill was filed on the 11th of October, 1800, by Bush against P. W. Livingston, Peter De Labigarre, and Margaret his wife, certain judgment creditors of De Labigarre, and Andrew Stockholm, for the foreclosure of a mortgage executed by De Labigarre and wife to Livingston, and assigned by him to Bush. An answer of De Labigarre and wife was put in without oath, and the other parties having answered or disclaimed, such further proceedings were had in the cause, that an order was, on the 24th of May, 1802, entered therein for the sale of the mortgaged premises. On the 15th of June, 1802, on the petition of De Labigarre and wife, the sale was suspended and leave given to them to put in a further and more perfect answer; and on the

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28th of August they filed their answer. After some intermediate proceedings, mentioned in the report of the case, an order was made on the 5th of March, 1805, referring it to a master to report the sum due, for principal and interest to the complainant, and the sum due on the mortgage, and also the value of the mortgaged premises. On the 4th of April, 1805, the report of the master came in; it was confirmed on the 6th of that month, and on the 7th of April, 1806, the chancellor ordered that the mortgaged premises should be sold; and that all proper parties should join the sale; and that the moneys arising therefrom should be brought into court, to be applied in the first place to pay the amount reported due the complainant, on his securities, with interest; and the residue to abide the further order of the court. It was from this order that De Labigarre and wife appealed.

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The proceedings in cause then, from the filing of the bill to the appeal from the order of sale, are according to the usual course of the court in ordinary cases of bills for the foreclosure and sale of mortgaged premises. I discern no trace in them of any proceeding peculiar to the case of an absent mortgagor, or indicating that De Labigarre and wife were proceeded against as absent mortgagors under the act.

But if the suit was, in any stage of it, prosecuted against those defendants as absent mortgagors, it took a different turn before the decree of sale of the 7th of April, 1806: and that decree must have been made under the general powers of the court, and not under the special provisions of the act relative to proceedings under absent mortgagors.

To authorize a decree for the sale of mortgaged premises, in a suit in this court against an absent mortgagor, under the provisions of the act then in force, for making process in courts of equity effectual against mortgagors who absconded or refused to appear, the bill must be taken *pro confesso* against the mortgagor, before the court decreed a sale of the mortgaged premises; and the order for taking the bill *pro confesso* must be founded on a previous order,

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which the court, upon an affidavit that the mortgagor had withdrawn out of the state, or could not, upon due enquiry, be found therein so as to be served with process, was authorized to make, requiring him to appear, by the day named therein; and if the mortgagor did not appear, the court might, on satisfactory proof of the publication of the order, as directed by the act, decree the sale. But if afterwards he mortgagor, at any time before the sale, caused his appearance to be entered, and paid the costs, the sale was to be stayed, and thereupon, such appearance being entered, the proceedings subsequently to be had in the cause, were to be such as are had in cases where the original appearance is entered in due season. Now, in the case of *Bush v. Labigarre and wife*, the bill does not appear to have been taken *pro confesso* against the mortgagors; and it is, moreover, distinctly stated, that they did appear, and put in an answer to the bill. The first order of sale was set aside on their petition; and if they were not in court before, they must have entered their appearance when they put in their answer, under the leave given them by the court for that purpose; and having appeared, they were entitled, in the further progress of the cause, to all the privileges of other defendants; and no decree could be made against them, which could not be made against other mortgagors, by the ordinary powers of the court, and according to the usual forms of proceeding.

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With these judicial opinions of my predecessors, and an express adjudication of this court before me, sanctioning a decree for the sale of mortgaged premises, on the prayer of the mortgagee, to satisfy the debt secured by the mortgage, can I pronounce the sale in this case to have been illegal and void, and on that ground allow the complainant to redeem the estate? My own convictions are in accordance with those of my predecessors; but if I had differed from them in opinion, the error on their part must have been gross and palpable, to induce me to overrule their decisions.

But the complaint insisted that the equity of redemption, if foreclosed by the sale, was opened by the subsequent

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proceedings of the defendant upon his judgment; and that he is therefore entitled to redeem the premises, notwithstanding the sale. This point, in that view of it, is involved in the first: for if the purchases are suffered to be redeemed, the sale is nugatory. But if the court has the jurisdiction to decree a sale, that sale must be conclusive, and the title of the purchaser must be absolute. In the present case, part of the premises was purchased by the mortgagor, but the residue was sold to strangers; and in other cases, strangers frequently became the purchasers of the whole: but whoever the purchasers may be, the title they acquire by a master's deed must be irredeemable, or the sale would be illusory.

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The rule, that a foreclosure in equity is opened by a subsequent action at law upon the bond, is founded on this principle: that the mortgagee who obtains a decree of foreclosure, as long as he holds under it, must be deemed to take the estate for the debt: and if he afterwards proceeds, as he may do, on his bond for the recovery of the debt, he must be deemed to waive his decree, and lets in the mortgagor to the right of redemption. But that rule does not apply to judicial sales. The object of the sale is to convert the estate into money, to be applied to the payment of the debt; and when the proceeds of the sale are thus applied, the whole or a portion of the debt equal to the avails of the mortgaged premises, is satisfied; and the action upon the bond, is for the residue and balance only of the debt which is left unpaid. The purchaser pays the value of the estate, and the mortgagor obtains the full benefit of it, by the application of the purchase money to the payment or reduction of his debt. If the proceeds of the sale are insufficient to satisfy the debt, he remains liable for the deficiency, and he cannot complain of being called upon to pay it, and upon no principle of equity, could he be permitted for that cause to disturb the sale, or reclaim the premises from the purchaser.

In the case of *Hatch v. White*, (2 Gallison, 152,) Judge Story, in deciding the question before him, was led to examine the position, that a decree of foreclosure is opened

by a subsequent action against the mortgagor, for the remainder of the debt left unsatisfied upon the sale of the mortgaged premises; and upon a review of the decisions of the English court of chancery on the point, and a full consideration of the principles of equity applicable to it, he expresses a clear and decided opinion against the rule, as involving an unsound and indefensible principle. And Chancellor Kent, in the case of *Duncan v. Van Buren*, says, that if the point was before him, he should be much inclined to agree in opinion with Judge Story, that there is no just foundation for the doctrine, and that he should especially doubt of its application in the case of a judicial sale under a decree; and in the case of *Perine v. Dunn*, he intimates a strong opinion to the same effect. The mortgagee, he says, in the case of a sale of the mortgaged premises under a decree of the court, has a chance of the surplus money arising from the sale; and is placed upon the same footing of equality with debtors against whom judgments are rendered and executions issued. And if so, the mortgagee must surely be liable for the residue of the debt, which the sale of the mortgaged premises does not satisfy, on the same principle that the debtor remains liable for the residue of the judgment debt, which is not made by the execution; and a subsequent suit at law of the mortgagee will no more open the sale, and revive the right to redeem the mortgaged premises, than a subsequent execution on the judgment against the debtor will entitle him to open the sales under the first execution and redeem the property that was sold.

The intimation of Chancellor Sandford, in the case of *Bridgen v. Carhartt*, that the remedy of the mortgagee for that part of the debt which is not obtained from the land is upon the bond, clearly shows that his opinion coincided with that of Chancellor Kent, that a subsequent suit at law for the residue of the debt, which the mortgaged premises fails to satisfy, does not open the sale, or revive the right to redeem.

This court, then, has already settled the principles which are to govern this case; and has judicially expressed the

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decided opinion, that the court has the jurisdiction to decree a sale of mortgaged premises; and that a subsequent suit for the residue of the debt does not open the decree. But it is said that the practice of this court in decreeing the sale of mortgaged premises, when it was introduced, was an innovation upon the course of proceeding in the English court of chancery; and how far it may be so, I propose presently to enquire. But if it was so, it violated no rule of law, but was in conformity to the principles of equity applicable to the contract of debtor and creditor; and this court, therefore, in adopting it, acted up to its own principles, and did no more than mete to the mortgagee the measure of equity to which he was entitled.

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I proceed briefly to inquire how far the course of proceeding on mortgages, in this court, does differ from that of the English court of chancery; and whether we divide from them in principle, or in points of practice only. In *the origin of this branch of the jurisdiction of the court when equity interposed to relieve the mortgagor from the forfeiture of his legal estate, the form of the remedy would naturally be, to allow the defaulter to redeem the estate, upon the performance of the original condition, by the payment of the money by a given day; and from this equity resulted the rule, that to extinguish or bar the right to redeem, the mortgagor must be called upon by the process of the court to pay the debt and redeem the estate within a limited time, or to submit to have the door to redemption closed against him. These remedies still continue in force, both in England and in this country; but with us, the rule requiring a strict foreclosure to bar the equity of redemption, has been superseded by the decree of sale, as the general course of the court; while in England, the ancient form of strict foreclosure still continues to be the course of proceeding on mortgages of estates in possession and has given way but partially to the decree of sale. In both countries, the old rule of foreclosure has been relaxed, and decrees of sale admitted as a substitute; and they differ only in the extent to which the relaxation has been carried. But the principle on which a decree for a sale is

partially admitted in England, fully justified this court in substituting it, (if deemed necessary or expedient) as the general course of practice in this country. The principle is, that the mortgage being now regarded and treated as a contract, pledging the land to secure the payment of the debt ; and not as a conveyance, creating an absolute estate, defeasible by the performance of the condition ; the sale of the land to satisfy the debt, on the default of the debtor to discharge it, has become an appropriate remedy for the mortgagee upon the security, and may be substituted for the foreclosure of the right to redeem, whenever the strict foreclosure is inadequate, or not adapted to the purposes of equity. Now, the effect of the strict foreclosure, is to vest the mortgagee with the absolute ownership of the land, which he never intended to purchase ; while the sale of the pledge restores to him the money he loaned, and the repayment of which was the object of his contract, and ought to be the fruit of his security. And it follows, that in this country, where the mortgage is generally understood to be a mere security for money, (and lands are by law subject to the payment of debt,) the right to sell, or the power to compel a sale of the estate in mortgage, is essential to the efficacy and value of the security, and is necessarily incident to the contract.

When the security consists of the pledge of stocks, personal effects or chattels real, the remedy in both countries is admitted to be by a sale of the pledge for the satisfaction of the debt ; and why is it the same remedy may not be applied to the mortgages of real estate, which are equally understood to be collateral securities, merely for the personal contracts of the mortgagor ?

The English court of chancery, however, notwithstanding the change of the mortgage contract, from a conditional sale to a collateral security, adheres, as a general rule, to the course of proceeding by foreclosure instead of sale. But that court does not adhere to that course as a matter of necessity, or because any serious doubt is entertained of its power to substitute a sale ; but because the change is not deemed expedient. But the preference given by the

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court to the foreclosure as a rule of practice, could not bind this court to the same course of proceeding, nor preclude us from substituting the decree for the sale of the mortgaged premises, as the general course of this court, if a sale be a more suitable remedy, in this country, than a strict foreclosure. There are sound reasons for requiring the sanction of a court to such a sale, and the superintendence of an officer of the court in conducting it. But there can be no solid objection, in principle, to a judicial sale of real estate, pledged by way of mortgage as a security for the satisfaction of the debt, on the application, or with the consent of the creditor, to whom it is pledged. The title is vested in the creditor, and the debt is owing to him; the form of the instrument by which the security is created, entitles him to the land itself, on the default of payment of the debt; and the substance of the contract is, that the land shall stand as security for the debt, to be applied, on default of payment by the debtor, to the satisfaction of the creditor; and if the creditor consents to the sale of the pledge, for the satisfaction of the debt, the debtor has no just cause of complaint; for he reaps the fruit of the estate in mortgage, by the application of the proceeds to the discharge of the debt. It is obviously for the benefit of the mortgagor that the sale should take place, in preference to the foreclosure, for most generally the pledge exceeds the value of the debt it is given to secure; and the mortgagor, in the case of a sale, will be entitled to the overplus, if the proceeds shall exceed the amount of the debt. And, moreover, as the mortgagee has a double security for his money, the personal bond of the mortgagor and the estate vested in him by the mortgage, if, as has been before remarked, his remedy upon his mortgage was confined to a strict foreclosure, he would never pursue it, until he had first exhausted his remedy against the mortgagor upon his bond, unless the value of the estate greatly exceeded the amount of the debt. The consequence would be, that in all cases where the strict foreclosure would benefit him and prejudice the mortgagor, the mortgage would be foreclosed; but where the estate was deemed a slender security for the

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debt, the remedy on the bond would be first pursued, and the mortgage kept in reserve for making up whatever deficiency there might be.

The force of these considerations has been felt by the English courts; and Lord Erskine, in the case of *Perry v. Barker*, (18 Vesey, 197,) admits that a decree for the sale of the estate, instead of a foreclosure, would be more analogous to the relative situation of lender and borrower; and that the English court of chancery on decreeing a foreclosure instead of a sale of mortgaged premises, does not act altogether up to its own principle. He manifestly prefers the course that prevails in Ireland, where the decree is for a sale instead of a foreclosure; and where, if the sale produces more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his remedy for the difference.

It is obvious, then, that the opinion of Lord Erskine was, that the court in which he sat possessed the power to decree a sale instead of a foreclosure; and that the sale of the mortgaged premises, for the satisfaction of the debt, would be more in accordance with the principles of equity, as between debtor and creditor, than the practice which prevailed in the court, of decreeing a foreclosure.

But notwithstanding the superior advantages of a sale; and the weight of Lord Erskine's opinion in its favor, the general course of the court of chancery in England, upon mortgages of estates in possession, has been to decree a foreclosure and not a sale of the estate. Still, however, that court, in cases of infant mortgagors, has deviated from the general rule, and decreed a sale.

Thus in the case of *Booth v. Rich*, (1 Vern. 295,) which occurred prior to 1684, there being an infant party to the suit, the court held that he could not be foreclosed without a day to show cause against the decree after he should attain his full age of twenty-one years; but that the proper way, in such a case, was to decree the land to be sold to pay the debt, and that such a decree would bind the infant. But the rule laid down in the case of *Booth v. Rich*, would seem to have fallen in after times into disuse; for Sir William Grant, the master of the rolls in 1811, when it was

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proposed, on the authority of that case, to take a decree of sale, instead of the usual decree, as more advantageous to the infant, said that the modern practice was to foreclose infants; and if no instance could be found in which the case cited had been followed, he would not make the precedent of a decree of sale; and no such case being produced, the usual decree was made for a foreclosure, with a day to show cause. From the reason given by Sir William Grant, for his refusal to direct a sale, it is manifest that he considered the sale, not as wrong in principle, but as against the course and practice of the court. He expressed no doubt of his right to make the decree, but he refused to exercise the power *because he would not make the precedent. He did not question the authority of the case which was cited, but said that the *modern practice* was to foreclose infants, and he did not incline to change it. But his refusal to make the *precedent*, implies the power to make it if he had seen fit to do so. If he had distrusted his jurisdiction, he would have put his refusal on that ground, and not on his disinclination to act.

But in the case of *Monday v. Monday*, (1 Ves. & Beames, 228,) decided in 1813, two years after the decree of Sir William Grant, a bill being filed against the infant heirs of the mortgagor and others, praying for a foreclosure or sale; the counsel for the complainants prayed a sale; observing, that though they could not produce an instance, it might perhaps be done, as the court had in many respects extended its jurisdiction for the benefit of infants; and Lord Eldon said, it would be too much to let an infant be foreclosed, when, if the mortgagee will consent to a sale, a surplus may be got for the benefit of the infant. He said, that if there was no precedent, he would make one; and he referred it to a master, to enquire whether it would be for the benefit of the infant that the estate should be sold.

Here was an assertion by the chancellor, of the power of the court to depart from the usual course of proceeding, at its discretion, and decree a sale instead of a foreclosure of the mortgaged premises. if the exigencies of the case

required it; and he declared, that notwithstanding the modern practice was, as Sir William Grant had stated, to foreclose infants, and the case of *Booth v. Rich* was admitted to be the only instance of a decree for a sale against an infant mortgagor, and the counsel praying for a sale could not produce an instance where it had been done; yet the chancellor, knowing that he possessed the power, and seeing that justice to the party called for its exercise, very properly determined to grant the prayer for a sale: and declared, that if there was no precedent for it, he would make one. And lamentable indeed would be the condition of suitors, if the court was precluded by the mere course of practice, from deviating from the beaten track, and moulding the exercise of its legitimate powers, and adapting its decrees to the exigencies of cases as they arise, to accomplish the purposes of equity and justice.

The authority of this case was sought to be obviated, by referring it to the general superintendence and powers of the court in cases of infancy. But if the court had no power to decree a sale, and if there must be a foreclosure to extinguish the equity of redemption, and a sale without a previous foreclosure, even by the order of the court, will pass nothing but the mortgage interest, which are the principles contended for by the complainant, I am at a loss to perceive how the jurisdiction of the court in cases of infancy could give any greater effect to the decree of the court in their case, than in that of adults. The court, in virtue of its general guardianship of infants, may, in the exercise of its legitimate powers, act with a larger discretion when its own ward is a party, than in other cases, and may perhaps extend its aid and protection to infants, when it would give no relief to adults; but the court cannot create or assume a jurisdiction which does not belong to it, for the benefit of infants, any more than for adults. And if, therefore, the chancellor had the power to decree the sale against an infant mortgagor, he would, on the same principle, have had the right to decree it against an adult.

And in the case of *Dashwood v. Bithazey*, (Mosely 196,)

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a sale was decreed in the case of an adult mortgagor, against whom the bill had been taken *pro confesso*. The case was decided by the master of the rolls in 1729. It is reported by Mosely, and cited by Powell in his treatise on the law of mortgagee; and the principle it established is there laid down as a settled rule of law. The bill was to foreclose; and the solicitor-general, of counsel for the complainant, prayed a decree for a sale instead of a foreclosure, because the security was defective, and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree of foreclosure; and he insisted that such decrees for sale were usual. But the master of the rolls said that he had *never known any, but that where the security was defective, it was often indeed referred to a master to set a valuation on an estate, and the complainant was to take it *pro tanto*. But the sale was decreed in that case, because the decree was that the bill should be taken *pro confesso*, and not according to the prayer of the bill. And a case of Norsworthy and Sergeant Maynard was quoted, where the security being defective, the cause stood over, and the complainant filed a supplemental bill, and prayed a sale.

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No question was made, in this case, of the jurisdiction of the court to decree the sale; and that jurisdiction must have been understood to belong to the court, or the sale could not have been decreed. The difficulties of the master of the rolls, were, that such a decree was not according to the prayer of the bill, which was for a foreclosure, and that it was not the usual course of the court to decree a sale: yet, as the bill had been taken *pro confesso*, he did not consider himself limited in his decree to the prayer for a foreclosure; and he assumed and acted upon the principle, that he was not precluded by the general course of the court from decreeing a sale.

From the reference made in this case to the case of Norsworthy and Sergeant Maynard, the practice would seem to have prevailed at that time, to proceed, in cases of defective securities, by a bill praying for a sale; and if such bills

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were in use, sales must have been decreed upon them. Nor has the English court of chancery confined its exercise of the power of decreeing sales to the cases of infant mortgagors, and bills taken *pro confesso* against adults. It clearly appears to have been the settled course of that court, in cases of bills on mortgages of reversionary interests, from an early day, to decree a sale, and not a foreclosure; and on mortgages of advowsons, the same course was pursued. (Wilmut on Mortgages, 95. 2 Powell, 331.)

Thus, in the case of *How v. Viguers*, (Rep. in Ch. 33,) decided in the reign of Charles the First, the bill was upon a mortgage of a dry reversion against the heirs at law of the mortgagor; and the complainant, who was the devisee of the mortgage, being a merchant, and his livelihood consisting in the returns of moneys, prayed that the defendants might pay the demand, or that the premises might be decreed to him to be sold to satisfy it; and the court, on this prayer of the bill, decreed the defendants to pay the amount due upon the mortgage, and in default, decreed the mortgaged premises to the plaintiff, to be sold for the satisfaction of his debt. So in the case of *M'Kenzie v. Robertson*, (3 Atk. 559,) decided in 1747, the bill was for the foreclosure of a mortgage upon an advowson; and Lord Hardwicke said, that the complainant, instead of bringing a bill of foreclosure, as he had done, should have prayed a sale of the advowson.

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So in the case of a bill filed against the representatives of a mortgagor, (*Daniel v. Shipworth*, 2 Bro. Ch. Ca. 155,) where the same person is heir and executor, and the personal estate is insufficient to pay the debt, the mortgagee may pay; and the court will decree a sale of the mortgaged premises, in the first instance, to satisfy the debt.

These are said to be exceptions to the general rule. They are so; but they take a wide range, and show the power of the court to decree a sale instead of a foreclosure, whenever the purposes of justice shall appear to require it. And if the court had jurisdiction to order a sale in those cases, they must surely have had the same power in every

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other case, in which they might have chosen to exercise it. But such a power must belong to the court in its ordinary jurisdiction, or the Irish court of chancery could not exercise it; for that court is governed by the same principles that prevail in the court of chancery in England, and derives the jurisdiction it possesses from the same sources.

My conclusion, therefore, is, that at the time of the separation of these states from Great Britain, and long before, the usual course of the court of chancery in England, on bills upon mortgages in possession, was to decree a foreclosure, and not a sale of the mortgaged premises; but that that court possessed, and was in the familiar exercise of *the jurisdiction of decreeing sales, in cases where the nature of the subject or the purposes of justice required that course of proceeding, and the form and prayer of the bill admitted of such a decree. And though the power to decree a sale may have been sparingly exercised, yet the jurisdiction was acknowledged and acted upon, not in a few insulated instances only, but habitually, and to a considerable extent. And the recent case of a decree for the sale of the interest of an infant mortgagor, introduced no new principle, but was an exercise of the ordinary powers of the court. If, then, upon all bills against infant mortgagors, and all bills upon mortgages of reversionary interests or of advowsons, and on bills against the heirs and personal representatives of the mortgagor in special cases, and on bills generally when taken *pro confesso* against the mortgagor, the court had the power to decree a sale of the mortgaged premises, they surely must have had the same power in other cases, if circumstances had equally called for its exercise. When, therefore, we adopted the common law, and the system of equity engrafted upon it, we were at liberty to apply the principles of that system according to our own policy, and were not bound to follow the course of policy it suited the practice of the English court of chancery to pursue in the exercise of the jurisdiction of the court in mortgage cases, any more than in other cases. Our court was at liberty to adopt the Irish practice, in preference to that which prevailed in the court of chancery in

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England; and this court, in the course it has prescribed to itself, of decreeing a sale of mortgaged premises instead of a foreclosure, established a rule adapted to the relative situation of lender and borrower, well calculated to give efficiency and value to mortgage securities, and to produce equitable and fair results to both the contracting parties. I am unable to discover any valid objection to the jurisdiction; and believing it to be well warranted by the principles of law, and benign and salutary in its operation, I cannot relinquish it merely because the course of practice in the English court of chancery may be different.

*But it is contended, that the decree of sale, if it binds the equity of redemption, is a species of foreclosure; and that on the principles of the English adjudications, the consequence must be, that the subsequent proceedings at law on the judgment, opened the decree, and revived the right to redeem.

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It is admitted that the sale, under the decree, is in effect a foreclosure, and conclusively bars the right to redeem; but the consequence does not follow that a subsequent proceeding at law for the difference, where the proceeds are inadequate to the payment of the debt, must open the decree, or revive the right to redeem. The object and legal effect of a foreclosure is to extinguish the equity of redemption, and to vest the premises unconditionally in the mortgagee; but the purpose of a sale is to convert the estate into money, for the satisfaction of the debt. Neither the foreclosure nor the sale discharges the mortgagor from his obligation on his bond or personal contract, except so far as the debt may be satisfied: the difference between them is, that the sale, by converting the pledge into money, ascertains, with certainty, the proportion of the debt it satisfies, but the foreclosure decrees the estate to the mortgagee, and leaves it in him without furnishing any standard of its value, or ascertaining whether it is sufficient to pay the debt or not. Hence it is, that the ulterior remedy on the bond, after a sale of the pledge, being for the difference only between the nett proceeds of the estate and the amount of the debt which the sale has ascertained, may be pursued,

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without disturbing the decree or impeaching the title of the purchaser ; but that the subsequent action on the personal contract of the debtor, after a decree of foreclosure, being for the whole demand, opens the decree, and reinstates the mortgagor in the right to redeem the estate, which was vested in the creditor for the consideration of the debt he seeks by his action to recover.

These are the principles which regulate the remedy of the mortgagee, upon his mortgage against the estate, and upon his bond against the person, in England, as well as in this state. No instance can be found, in either country, where a sale of reversionary interests, or other saleable estates, under a decree, has been opened by a suit at law upon the bond, for a deficiency of the proceeds of the sale to satisfy the debt. It is to decrees of strict foreclosure only that the rule is applied ; and to such decrees it would be applicable in both countries ; for in those cases equity requires that the action at law for the debt, by the creditor, who has taken and holds the estate under a decree of foreclosure, should be enjoined, or the mortgagor remitted to his right to redeem the pledge, by paying the debt. The course has been to refuse the injunction, but to permit the redemption.

It is the settled doctrine, therefore, of the court of chancery in England, where the foreclosure of mortgages upon estates in possession is the ordinary course of the court, that the mortgagee may, after the decree of foreclosure, proceed at law upon the bond or personal contract of the mortgagor, for the recovery of his debt ; but that if he does elect to pursue his personal remedy, he waives the benefit of his decree of foreclosure, and reinstates the mortgagor in his right to redeem the estate. He cannot at the same time retain the estate, which has become absolute in him by the foreclosure, and recover the debt which is the consideration of that estate, by an action on the bond.

Thus it was decided at the rolls in the case of *Dashwood v. Blythway*, (1 Eq. Ca. Ab. 317,) that if a mortgagee has a decree of foreclosure, though that decree be signed and enrolled, yet if he, after bringing an action of

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debt on the bond, for the payment of money or performance of the covenant in the mortgage deed, such action opens again the foreclosure, and lets in the equity of redemption of the mortgagor.

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The principle of this case has been frequently recognised, and may be regarded as the settled rule of law ; but it does not apply to decrees for the sale of the estate, for the sale is for the account of the mortgagor ; and if the produce of it exceeds the debt, the mortgagor will be entitled to the surplus ; and if it falls short, he will remain liable on his personal contract for the deficiency.

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In the case of Dashwood against Bithazey, which was decided at the same period of time with that of Dashwood against Blythway, and has been before cited for another purpose, this distinction between the principle of foreclosure and sale was admitted and acted upon by the master of the rolls. A sale was there decreed, instead of a foreclosure, upon a bill taken as confessed against the mortgagor, upon the suggestion of the complainant's counsel that the security was defective, and on the ground that if a foreclosure was decreed, and the defendant should afterwards be sued on his bond, that would open the decree of foreclosure.

This case of Dashwood *v.* Bithazey appears to have been decided in the same year, and at the same term of the court as that of Dashwood *v.* Blythway, and they are both stated to have been decrees at the rolls. From these and other coincidences, it is very possible that the case in Mosely may be the authority referred to in the abridgment, under the title of Dashwood against Blythway. But whether the cases be the same or not, the case of Dashwood *v.* Bithazey, shows that the principle on which the subsequent action on the bond was held to open the previous decree of foreclosure, did not apply to decrees of sale ; and that a decree for sale, where the security is defective at that day, might be permitted by the court, as the proper course to obviate the embarrassment which a decree of foreclosure would produce. That was the case, it is true, of a bill taken as confessed ; the allegation of the

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court to the foreclosure as a rule of practice, could not bind this court to the same course of proceeding, nor preclude us from substituting the decree for the sale of the mortgaged premises, as the general course of this court, if a sale be a more suitable remedy, in this country, than a strict foreclosure. There are sound reasons for requiring the sanction of a court to such a sale, and the superintendence of an officer of the court in conducting it. But there can be no solid objection, in principle, to a judicial sale of real estate, pledged by way of mortgage as a security for the satisfaction of the debt, on the application, or with the consent of the creditor, to whom it is pledged. The title is vested in the creditor, and the debt is owing to him; the form of the instrument by which the security is created, entitles him to the land itself, on the default of payment of the debt; and the substance of the contract is, that the land shall stand as security for the debt, to be applied, *on default of payment by the debtor, to the satisfaction of the creditor; and if the creditor consents to the sale of the pledge, for the satisfaction of the debt, the debtor has no just cause of complaint; for he reaps the fruit of the estate in mortgage, by the application of the proceeds to the discharge of the debt. It is obviously for the benefit of the mortgagor that the sale should take place, in preference to the foreclosure, for most generally the pledge exceeds the value of the debt it is given to secure; and the mortgagor, in the case of a sale, will be entitled to the overplus, if the proceeds shall exceed the amount of the debt. And, moreover, as the mortgagee has a double security for his money, the personal bond of the mortgagor and the estate vested in him by the mortgage, if, as has been before remarked, his remedy upon his mortgage was confined to a strict foreclosure, he would never pursue it, until he had first exhausted his remedy against the mortgagor upon his bond, unless the value of the estate greatly exceeded the amount of the debt. The consequence would be, that in all cases where the strict foreclosure would benefit him and prejudice the mortgagor, the mortgage would be foreclosed; but where the estate was deemed a slender security for the

debt, the remedy on the bond would be first pursued, and the mortgage kept in reserve for making up whatever deficiency there might be.

The force of these considerations has been felt by the English courts; and Lord Erskine, in the case of *Perry v. Barker*, (18 Vesey, 197,) admits that a decree for the sale of the estate, instead of a foreclosure, would be more analogous to the relative situation of lender and borrower; and that the English court of chancery on decreeing a foreclosure instead of a sale of mortgaged premises, does not act altogether up to its own principle. He manifestly prefers the course that prevails in Ireland, where the decree is for a sale instead of a foreclosure; and where, if the sale produces more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his remedy for the difference.

It is obvious, then, that the opinion of Lord Erskine was, that the court in which he sat possessed the power to decree a sale instead of a foreclosure; and that the sale of the mortgaged premises, for the satisfaction of the debt, would be more in accordance with the principles of equity, as between debtor and creditor, than the practice which prevailed in the court, of decreeing a foreclosure.

But notwithstanding the superior advantages of a sale; and the weight of Lord Erskine's opinion in its favor, the general course of the court of chancery in England, upon mortgages of estates in possession, has been to decree a foreclosure and not a sale of the estate. Still, however, that court, in cases of infant mortgagors, has deviated from the general rule, and decreed a sale.

Thus in the case of *Booth v. Rich*, (1 Vern. 295,) which occurred prior to 1684, there being an infant party to the suit, the court held that he could not be foreclosed without a day to show cause against the decree after he should attain his full age of twenty-one years; but that the proper way, in such a case, was to decree the land to be sold to pay the debt, and that such a decree would bind the infant. But the rule laid down in the case of *Booth v. Rich*, would seem to have fallen in after times into disuse; for Sir William Grant, the master of the rolls in 1811, when it was

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proposed, on the authority of that case, to take a decree of sale, instead of the usual decree, as more advantageous to the infant, said that the modern practice was to foreclose infants; and if no instance could be found in which the case cited had been followed, he would not make the precedent of a decree of sale; and no such case being produced, the usual decree was made for a foreclosure, with a day to show cause. From the reason given by Sir William Grant, for his refusal to direct a sale, it is manifest that he considered the sale, not as wrong in principle, but as against the course and practice of the court. He expressed no doubt of his right to make the decree, but he refused to exercise the power *because he would not make the precedent. He did not question the authority of the case which was cited, but said that the *modern practice* was to foreclose infants, and he did not incline to change it. But his refusal to make the *precedent*, implies the power to make it if he had seen fit to do so. If he had distrusted his jurisdiction, he would have put his refusal on that ground, and not on his disinclination to act.

But in the case of *Monday v. Monday*, (1 Ves. & Beames, 228,) decided in 1813, two years after the decree of Sir William Grant, a bill being filed against the infant heirs of the mortgagor and others, praying for a foreclosure or sale; the counsel for the complainants prayed a sale; observing, that though they could not produce an instance, it might perhaps be done, as the court had in many respects extended its jurisdiction for the benefit of infants; and Lord Eldon said, it would be too much to let an infant be foreclosed, when, if the mortgagee will consent to a sale, a surplus may be got for the benefit of the infant. He said, that if there was no precedent, he would make one; and he referred it to a master, to enquire whether it would be for the benefit of the infant that the estate should be sold.

Here was an assertion by the chancellor, of the power of the court to depart from the usual course of proceeding, at its discretion, and decree a sale instead of a foreclosure of the mortgaged premises. if the exigencies of the case

required it; and he declared, that notwithstanding the modern practice was, as Sir William Grant had stated, to foreclose infants, and the case of *Booth v. Rich* was admitted to be the only instance of a decree for a sale against an infant mortgagor, and the counsel praying for a sale could not produce an instance where it had been done; yet the chancellor, knowing that he possessed the power, and seeing that justice to the party called for its exercise, very properly determined to grant the prayer for a sale: and declared, that if there was no precedent for it, he would make one. And lamentable indeed would be the condition of suitors, if the court was precluded by the *mere course of practice, from deviating from the beaten track, and moulding the exercise of its legitimate powers, and adapting its decrees to the exigencies of cases as they arise, to accomplish the purposes of equity and justice.

The authority of this case was sought to be obviated, by referring it to the general superintendence and powers of the court in cases of infancy. But if the court had no power to decree a sale, and if there must be a foreclosure to extinguish the equity of redemption, and a sale without a previous foreclosure, even by the order of the court, will pass nothing but the mortgage interest, which are the principles contended for by the complainant, I am at a loss to perceive how the jurisdiction of the court in cases of infancy could give any greater effect to the decree of the court in their case, than in that of adults. The court, in virtue of its general guardianship of infants, may, in the exercise of its legitimate powers, act with a larger discretion when its own ward is a party, than in other cases, and may perhaps extend its aid and protection to infants, when it would give no relief to adults; but the court cannot create or assume a jurisdiction which does not belong to it, for the benefit of infants, any more than for adults. And if, therefore, the chancellor had the power to decree the sale against an infant mortgagor, he would, on the same principle, have had the right to decree it against an adult.

And in the case of *Dashwood v. Bithazey*, (Mosely 196,)

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In *Perry v. Barker*, (8 Vesey, 527,) the case was, that the estate was, after foreclosure, sold at auction by the mortgagee, without notice to the mortgagor; and producing less than the sum reported due, an action was brought on the bond for the difference; upon which a bill was filed, praying a redemption and an injunction, or that the defendant might be deemed to have elected to take the premises in satisfaction of his demand, and might be forever restrained from proceeding against the complainant. Lord Eldon observed, that no case had been produced previous to 1786, in which the mortgagee, after foreclosure, had brought the estate to a sale, and afterwards brought an action for the money; and he said that Mr. Maddock, one of the counsel for the defendant in the case of *Tooke v. Hartley*, who knew the practice of the court well, felt great difficulty in contending broadly that the mortgagee might sell the estate after foreclosure, and then proceed upon the bond. He thought that the case of *Tooke v. Hartley* did not decide that point; for the sale there was to the trustee of the mortgagee, and the estate continuing in his possession, might on a redemption, be reconveyed to the mortgagor; which, in case of sale to a stranger, could not be done. But he observes, that he understood Lord Thurlow's opinion to have been, that whether the estate was sold to a stranger, or remain in the hands of the mortgagor, there was no distinction, but an action might be brought for the difference; and he said that the opinion of Lord Thurlow, and the circumstance that the particular case had never been decided, made it proper to grant the injunction.

This case afterwards came on to be heard before Lord Erskine in 1806, (13 Vesey,) 197, when it was contended on the one side that the effect of putting the bond suit in was to revive the right of redemption; and that the mortgagee having sold the estate, must either get it back, so that the mortgagor might redeem, or must be considered as having elected to take the estate in satisfaction of the debt; and on the other side, it was conceded that the action upon the bond so far opened the decree of foreclosure, that

the estate must be brought into the account ; but it was insisted that if the pledge was not sufficient to pay the debt, the creditor might resort to his other securities. The chancellor, from the importance of the subject, and Lord Thurlow's opinion, at first deferred his decision, stating, however, that he inclined to the opinion that the foreclosure was opened by the action ; and he afterwards declared that he continued of the opinion he had expressed, and was confirmed in it by an opinion of Lord Redesdale ; and he observed that if there was any possibility that the mortgagor could get the estate back again, he ought to have a time allowed him for that purpose ; but as that could not be done, he thought the best decree he could make would be to restrain the further prosecution of the suit at law, and he made the injunction perpetual.

But the chancellor was evidently dissatisfied with the decision he found himself bound to make ; he felt the weight of Lord Chancellor Thurlow's opinion in favor of the mortgagee, and the force of the consideration that the transaction was a loan, and the mortgage, by the law of the court, a collateral security merely for the payment of the money ; and that the principles of equity, as between the contracting parties, required that the pledge should be converted, by sale, into money, to satisfy the debt. But the sale made by the mortgagee himself, after he had obtained the decree of foreclosure, without the direction of the court or the assent of the mortgagor, either express or implied, for its sanction, could not, he thought, be regarded as a sale of the pledge, for the account of the mortgagor : and it followed as a necessary consequence, that the subsequent action at law must be held to revive the right to redeem the estate, but which redemption could not be permitted, as the title had become vested in the purchaser under the sale. The chancellor was therefore compelled to enjoin the action at law, as the best equity in his power to administer ; but he intimated that the decree of foreclosure was the cause of the embarrassment on the subject, and expressed a strong opinion that the court had not acted up to its own principle in decreeing a foreclosure, in-

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stead of a sale; and, as has been before observed, he referred with approbation to the practice in Ireland, as showing the practical operation of the decree of sale, in settling the rights of the parties. From this exposition of the case, it will be seen, that so far from discountenancing judicial sales, it strongly recommends them, as a suitable *standard of the value of the pledge or estate in mortgage; and that the opinion of the chancellor was, that, in the case of a sale, the mortgagor would be entitled to the surplus, or liable to make up the deficiency, according to the result.

But the case is an authority against the competency of a sale, by the mortgagee himself, to ascertain the value of the estate, as between him and the mortgagor; and so far it seems to conflict with the opinion of Lord Thurlow on the point, as represented by Dickens.

This case, it is true, differs from that in some of its features. In that case, notice was given to the mortgagor of the intention to sell, but the sale was made to a trustee for the mortgagee, so that no change was effected in the ownership or possession of the premises by the sale; but in this case, the sale was without notice, but the estate was sold to a stranger. This distinction was noticed in argument; and it was urged, that the mortgagee, if entitled to sell, was at least bound to give notice to the mortgagor of his intention, and must state that he means to sell as trustee, and put it out of his power to take the surplus. The court advert to the propriety of the previous acknowledgment of the mortgagor of his acting as a trustee, but lay no stress upon the point. The sale appears to have been wholly disregarded as the standard of value; and the court in determining that the subsequent action at law was a waiver of the decree of foreclosure, seem to have intended to place the decision on the broad ground of the incompetency of the mortgagee, after foreclosure, to treat the estate as a trust, dispose of it by a voluntary sale for account of the mortgagor, and make him answerable for the deficiency. And the objections to the right of the mortgagee to sell without a decree, are certainly entitled to great consideration; for the power it gives him to consider the property

as a pledge, or as an absolute estate of his own, at his option, if unlimited, would be incompatible with the just rights of the mortgagee. The mortgagee, in the exercise of such a power, must at least be required to determine, "before he puts up the estate to sale; whether he will consider it as a pledge or not; and perhaps must, upon his entry under the foreclosure, make his election to take the estate as absolute owner, or as trustee for sale on account of the mortgagor; and he must give timely notice of his intention to sell, and that he will sell as trustee, and account for the surplus. These requisities would seem indispensable to guard against abuse; but even with these qualifications, the right of the mortgagee to sell is not free from objection, and may justly be regarded as of questionable propriety.

These views of the subject, further illustrate the superior advantages of a decree for sale; as the court, in the exercise of that jurisdiction, may, at the instance of either party, prescribe such terms and give such directions as equity may appear to require, and may take care that the sale be so conducted as to produce the best and most beneficial result.

But it was said, that admitting the power of the court to direct a sale of the estate; yet, to make the sale effectual there should first be a decree of foreclosure to extinguish the equity of redemption. And it is suggested, that the former practice of this court was to enter two separate decrees, the first to foreclose the right to redeem, and the second for the sale of the mortgaged premises; or that, if there was but one decree, it was made to contain, first, a formal adjudication that the equity of redemption be foreclosed, and secondly, an order that the mortgaged premises be sold to satisfy the debt. But these forms of decrees, supposing them once to have been in use, both assume the power of the court to decree a sale. The decree of foreclosure which accompanies or precedes the decree of sale, is obviously matter not of substance, but of form; the purpose of the bill and the essence of the decree, is the sale. If the mortgagor is entitled to a foreclosure and sale, the

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formal decree of foreclosure can be of no possible use. The decree of foreclosure is necessarily included in the decree of sale; for the sale and conveyance of the estate to a purchaser under the decree of the court, "must extinguish the right of the mortgagor to redeem it. If, then, the court had the power to decree a sale, it could not be necessary for the exercise of that power, first to decree a foreclosure, and then a sale. That form was, in effect, circuitously a decree for the sale of the estate; and it surely was no departure from principle, to dispense with the formal decree of foreclosure, and decree the sale in the first instance. The latter course, in its result, reaches the same point, and effects the same remedy as the former; the application of the estate, to the extent of its value, to the satisfaction of the debt, with liberty to the creditor to resort to his other securities for the deficiency; and the right of the mortgagor, as owner of the estate, to the surplus, if it sells for more than the amount for which it was pledged.

A judicial sale of the estate under the decree of the court, then if the court has the power to make the decree, whether it be in form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree for sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem; and the purchaser will hold it, under the title he acquires to it by virtue of the sale, and the conveyance he receives from the master, free and discharged from the equity of redemption. The purchase money then stands in the place of the estate, and will be applicable as that was, first to the satisfaction of the debt to the mortgagee, and the overplus and residue, if any, to the use of the mortgagor; and if the produce proves insufficient to satisfy the debt, he will remain personally liable for the deficiency.

But the authority of this court to decree the sale of mortgaged premises for the satisfaction of the debt, which thus has the foundation in the principles of equity applicable to the contract of lender and borrower, and the general jurisdiction of the court, is moreover recognized and sanctioned by the legislature. The eleventh section of the act

concerning the court of chancery, (1 Revised Laws, 486,) declares that all sales of mortgaged premises under any decree of the court of chancery, shall be made, and deeds executed for the same, by one of the masters of the court; and that such deeds shall be as valid as if the same had been executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and their heirs respectively, both in law and equity.

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The twelfth section provides for the case of decrees for sale of mortgaged premises, where a penalty has become forfeited by reason of the nonpayment of interest only, or of a portion or instalment of the principal, on the mortgage.

These statutory provisions, in giving efficacy to sale by masters, by necessary implication, sanction the decrees for sale. The legislature, by regulating the exercise of the power of decreeing sales, admit the jurisdiction of the court to make the decree, and would impliedly confer it if it did not exist before. But it is objected, that these statutory provisions relate exclusively to sales under the act relative to proceedings on mortgages against absent and absconding mortgagors; and that express power is conferred by those acts upon this court, to decree a sale in such cases.

The answer to the objection is found in the statute itself. In the first place, the provisions are general, and, in their terms, embrace all sales of mortgaged premises under any decree of the court of chancery in any case whatsoever. The act was passed in 1813, and it sanctions the practice which then prevailed in the court, and the sales which were made under it. But in the next place, the act contains two subsequent sections making special provision for the particular case of absent and concealed mortgagors. By the twenty-first section of the act, is provided, that whenever proceeding shall be had in the court of chancery against any absent or concealed defendant, to the end to procure a foreclosure or satisfaction of any mortgage, it shall be lawful for the court to decree a sale of the mortgaged premises; and by the twenty-second section, it is declared that the two previous sections of the act, relative

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to sales of mortgaged premises, shall apply to all sales under the preceeding twenty-first section of the act. The reference in the twenty second-section to the thirteenth section of the act, is obviously in error; for the thirteenth *section has no particular connection with the subject of sales or mortgages, but relates to other matters. The reference was doubtless intended to be to the eleventh and twelfth sections of the act, which apply expressly to sales of mortgaged premises, and are the only sections in the act which can satisfy the obvious intent of the reference contained in the twenty-second section. It is by the eleventh section alone, that the master is authorised to make sales and execute deeds; that authority was unquestionably intended to be extended by the twenty-second to sales arising under the twenty-first section of the act, and the twenty-second section must therefore have been intended to refer to the eleventh and twelfth sections, and not to the twelfth and thirteenth sections. A similar error occurs in the twenty-third section of the act, which refers to the twenty-second section, when the twenty-first section must be intended, or the whole of the twenty-third section which contains the reference is senseless and nugatory.

It is apparent, then, that the provisions of this statute, relative to proceedings against absent and concealed mortgagors, and for sales in that particular class of cases, are distinct and separate from the provisions it contains for sales of mortgaged premises generally. Can it be presumed that the legislature intended to make a double provision for the same object? If the only purpose of the act was to authorise and regulate sales in the cases of absent and concealed mortgagors, the frame of its provisions would have been adapted to that end. But the legislature applied the twenty-first section of the act to the particular case of absent and concealed mortgagors, and inserted in it provisions that are not applicable to other cases on mortgages. The eleventh section is clearly intended to apply to all sales of mortgaged premises under the decree of the court; and the purpose of the twenty-second section, is to extend the regulations of the general system under the

eleventh and twelfth sections, to the particular class of cases comprised in the twenty-first section. I am therefore of opinion that the eleventh and twelfth sections of this act are not to be confined to proceedings against absent and *concealed mortgagors, but that they are general in their operation, and extend to and sanction all sales of mortgaged premises under any decree of the court.

It is admitted that these two sections of the present act were parts of the act of 1801, concerning the court of chancery, and the proceedings therein, and were adopted by the revisors in 1813; but the history of the origin of those sections of the present act, discloses no ground for varying the construction which their terms require. One of the objects of the eleventh section, and which formed the thirteenth section of the act of 1801, was to authorize a master to make sales and execute deeds. The court already possessed the power to decree the sale; but anterior to that statutory provision on the subject, there was no officer who was authorized to give conveyances, and the course was to direct all proper parties to join in the deeds to the purchasers. The inconveniences of that system were removed by the statute provisions, conferring on the master the power to make the sales, and execute deeds.

But provisions had been made by statute, long before the act of 1801, and were then in force, for authorizing and regulating proceedings in equity against absent and absconding or concealed mortgagors; a statute was in force on the subject under the colonial government, and on the 7th of March, 1785, an act was passed by the legislature of the state, whereby the court of chancery was authorized to decree the sale of mortgaged premises, in suits against mortgagors who were withdrawn from the state, or could not on due inquiry, be found therein, to be served with process, and who neglected to appear, and suffered the plaintiff's bill to be taken *pro confesso* against them, according to the directions and provisions in the act, for that purpose contained, and by which act the sale was to be made of the premises decreed to be sold, by the sheriff of the county wherein the lands were situated, under and by virtue of a

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writ issued by the court to him, commanding him to make sale of the same, and deeds were to be executed for the same, by the sheriff, to the purchaser. This act was amended on the 13th day of March, 1787, and continued in force, as amended, until the 2d of April, 1801, when it was re-enacted, under the title of "An act for making process in courts of equity effectual against mortgagors, who abscond or refuse to appear. It was in force as a separate and distinct act, at the time of the passing of the act of the 3d of April, 1801, concerning the court of chancery and the proceedings therein, which contained the section giving the general authority to masters to make sales and execute deeds under the decrees of the court. These two acts were separately adopted, and passed coterminously, by the legislature in 1801, and formed part of the revised laws of that period; and I apprehend that the 13th section of the act of 1801, concerning the court of chancery and the proceedings therein was understood to be a general regulation, applying to all sales of mortgaged premises, under the decrees of the court, and not a partial provision auxiliary to the particular jurisdiction of equity, in cases of absent and concealed mortgagors. So general and so strong was the impression that these powers, thus conferred on masters, were not intended to be confined to sales authorized by the act for making process in the courts of equity effectual against mortgagors who abscond or refuse to appear, that doubts arose whether they could be extended or applied at all to sales made under that act, and whether that sales authorized by that act were not, as before, to be made by the sheriffs of the counties, according to the provisions of the act itself. In practice, however, sales were made, and deeds executed by masters, in these as well as in other cases; but the doubt entertained of the validity of such sales was so serious that the attention of the legislature was drawn to the subject; and in an act passed the 7th of April, 1806, (4th vol. Laws of N. Y., Webster's and Skinner's ed. 615,) after reciting that doubts had arisen upon the construction of the several sections therein mentioned, of the acts in question, it was provided that all sales

of mortgaged premises, made under decrees in the court of chancery, in pursuance of the act for making process in courts of equity effectual against mortgagors who abscond or refuse to appear, should be made in the manner prescribed by the act concerning the court of chancery and the proceedings therein, and that the monies arising *from such sales should be applied in the manner directed by the 13th and 14th sections of the last mentioned act; and all sales of mortgaged premises, made under decrees of the court, in the mode prescribed by the last mentioned act, were confirmed.

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If the power conferred on masters, to make sales and execute deeds of mortgaged premises under the decrees of the court, was intended to apply to sales under decrees against absent and concealed mortgagors solely, how could the doubt thus noticed by the legislature have arisen? or how could a legislative provision have been deemed necessary or expedient to remove it?

I see no sufficient cause for limiting the powers of the masters to sales under the act relative to proceedings against absent and concealed mortgagors. And there is ground for supposing that those powers were intended and understood to be general, and to apply to all sales of mortgaged premises, under the general jurisdiction of the court, or any particular act of the legislature. But whatever the true construction of the former act may be, the act concerning the court of chancery, passed in 1813, and now in force, appears to me to put the question at rest. Under that act this court impliedly has the general power, (which, by its general jurisdiction, it also possesses,) to decree the sale of mortgaged premises, and the master is authorised to make the sales and execute deeds, in fulfilment of the decree.

In the case before me, the bill in the original suit upon the mortgage, was taken *pro confesso* against the mortgagor, and a decree was thereupon made, on the prayer of the mortgagee, for the sale of the mortgaged premises. A sale has been made of the premises under the decree. That decree is still in force. It is admitted that the sale was

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regular in point of form, and its fairness is not impeached. The proceeds were not sufficient to satisfy the debt; and the subsequent proceedings at law were for the deficiency, and upon these facts my opinion is that the sale was valid and effectual in law, and that the master's deed is an entire bar against the complainant's suit; and that the subsequent proceeding at law, upon the judgment, to obtain the deficiency which the sale failed to produce, did not open the decree. The demurrer must therefore be allowed.

The appellant, in person, insisted that, by the common law, *strict foreclosure* on a mortgage in fee, was the only process to bar the equity of redemption; and that this common law is the law of the state. That foreclosure and sale are of recent practice, and repugnant to the law of the state; and that a sale *solely*, as in this case, is neither sustained by law nor practice.

He said, if a sale can constitute a foreclosure, the common law maxim, *that if the mortgagee takes the land, the mortgagor takes the money*, extinguishes the debt.

Neither the inherent powers of a court of chancery, or any law of this state, can give validity to the sale in this case.

C. G. Troup & J. V. Henry, contra, insisted that the court of chancery has power not only under the general authority of the court, but under statutes of this state, to decree a sale of real estate mortgaged. That a master's sale and conveyance under such a decree is as binding and conclusive as a sale and conveyance from the mortgagor and mortgagee. The equity of redemption is not left open by there not having been a decree of express foreclosure.

Nor did the proceeding by execution, to obtain satisfaction of the balance due on the bond, after crediting the amount of the sale under the mortgage, open the equity of redemption. (b.)

(b) A reference to *Lansing v. The Albany Insurance Company*, (1 Hopk. Ch. Rep. 102,) and *The Globe Insurance Company v. Lansing*, (5 Cowen, 280,) with the following cases, a note of which was furnished to the court of errors by the learned and venerable appellant, himself the late chancellor of

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WOODWORTH, J. declined giving an opinion, on the ground that he had purchased lands, the title to which depended on decrees like the one in question.

this state, will so fully exhibit the history and grounds of, and the books relating to the controversy now put at rest by the principal case, that I have deemed it unnecessary to state more which came from counsel than the points made by them.

IN CHANCERY. } September 7, 1824.
EGBERTS v. LANSING. }

Sanders Lansing mortgaged in fee to the complainant a lot in Water street, in the city of Albany, for securing the payment of \$1000, to the equity of redemption of which the defendant, John Lansing, junior, had become entitled.

A bill to foreclose had been filed; a reference to a master obtained; and upon the coming in of his report, T. V. Peckham moved for a confirmation, and an order for sale of the mortgaged premises.

The defendant J. Lansing, objected.

There is no law in this state to warrant a judicial sale on a mortgage in fee, where all the parties appear. It is a process of recent introduction. The rule is to foreclose: that is, to adjudge the mortgagor entirely barred, which devolves his interest upon the mortgagee, by merging it into the mortgagor's estate at law. So has always been the practice, till about the year 1817. The new practice is repugnant to the common law.

SANFORD, Chancellor. I found the practice so; it has obtained for some time, and I will adhere to it.

Order for sale.

IN CHANCERY.

LANSING v. GORLET, (the principal case.)

After stating the case substantially as stated in the text, three points were made by the plaintiff:

1. That a mortgagee, before foreclosure, has merely a chattel interest in the mortgaged estate;
2. That the sale of that chattel interest cannot affect the equity of redemption;
3. That if the order for sale is deemed a foreclosure, it is a satisfaction of the mortgage debt.

Plaintiff, in person. That the interest of the mortgagee before foreclosure is a chattel, has been long held, as appears from numerous authorities. (1 Ch. Cas. 286. 2 id. 363. Br. Rep. 200. Dougl. 816. 2 Vern. 367. Pres. in Ch. 11. 2 Vern. 198. Sir W. Blackstone's Rep. 145. Salt. 695.) And the same doctrine was recognized by Chancellor Kent, in *Wilson v. King*, (1 John. Ch. Rep. 145. 7 John. Ch. Rep. 25,) saying it down broadly, that a mortgagee can do no act to affect the mortgagor's right before foreclosure.

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*SUTHERLAND, J. because he was related to the appellant and

SAVAGE, Ch. J. because he had expressed an opinion on one of the questions raised, while sitting for the chancellor in a cause wherein the appellant was a party. (Vid. 1 Hopk. 104.)

and accordingly, whenever he speaks of sales on mortgagee, he always couples them as a foreclosure and sale. If so, the sale in this case only passed a chattel.

The second point; The common law text is, if the mortgagor takes the land, the mortgagee takes the money: the one is a full equivalent for the other. (Cro. Car. 331. 2 Keb. 387. Co. Lit. 332. 1 Ch. Ca. 244. 2 Atk. 103. 8 Co. 116.) On this point all unite; and every modern systematic writer on the subject, *Blackstone*, *Powell* and *Cruise*, in deducing the doctrine of mortgages, express not the least hesitation on the subject as to the correctness of this text.

As to the third point, there is no act of the legislature of this state on the subject of judicial sales, excepting only as to absentee mortgagors. There is no decree of foreclosure in those cases; and the legislature seem to have had this distinction in their eye, by the provision that the master's deed shall have like effect as if executed by the mortgagor and mortgagee.

The English court of chancery held this an open question for a long series of years. The departure from the common law, and the return to it are to be traced through Mosely, 19 Eq. Cas. Ab. 317; Viner's Ab. title Mortgages, F. p. 24; 2 Dick. 551, 785, 787; 2 Bro. Ch. Rep. 125, 126; 1 Vern. 257; 2 Atk. 103; 18 Ves. 83, 197; and 1 Ves. & Bea. 223; the last two cases in 1806 and 1813.

The common law of this state, from its constitutional limit, is paramount to the most ancient of these cases. On the case of *Monday v. Monday*, on a supposed pre-existing practice in this court, and on the construction that a bill of foreclosure was a proceeding *in rem*, and so conferred jurisdiction over the mortgaged premises, and every person or thing connected with them, the doctrine of judicial sales was bottomed by Chancellor Kent—all manifestly erroneous.

This was adjudged in *Kershaw v. Thompson*, (3 John. Ch. Rep. 387,) in 1818.

That sales were not in the course of the common law, has been shown. On a search recently directed by Chancellor Sandford, it appeared that a strict foreclosure was in the colonial course from the origin of chancery in the colony till the revolution. The origin of the state practice as to judicial sales, has been recognized in the cases adjudged in this state as receiving its start from the adjudication in *Kershaw v. Thompson*. In that case, that of *Yates v. Hinkly*, was cited as a decision of Lord Hardwicke, (3 Atk. 360,) as supporting the doctrine that a bill of foreclosure was a proceeding *in rem*.

*But several of the senators declaring they had no doubt upon the case, an early day was assigned for its decision, when the opinion of this court was delivered by

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That case arose on a bill *to redeem*, which was in effect a proceeding *in rem*. but it became so by the Stat. Geo. 2, ch. 7, and the decree was in strict conformity to that statute.

Henry, for defendant, stated two points:

1. That there not being a decree of foreclosure where a sale was directed, does not leave the equity of redemption open;
2. That the prosecution for satisfaction by judgment on the bond accompanying the mortgage, and the execution, did not open the equity of redemption.

The master's sale gave effect to the decree as effectually as if made by the mortgagor and mortgagee. Cases of strict foreclosure are of rare occurrence. He had only one during his practice. Sale includes foreclosure. (2 Powell on Mort. 1039, 1040, 1059, 1060.) Personal estate was sold to supply deficiency on mortgage. It is the course of the court to exercise power of sale. Debt must be satisfied. (2 John. Rep. 490. *Delabigare v. Bush*, 3 John. Rep. 169. 13 Ves. 84. 1 Hopk. 231. *id.* 103. *Lansing v. Albany Insurance Company*.) The execution is only for deficiency. Judgment and sale are conclusive. To open the sale, is to restore the pledge; but this sold to strangers. Statute expressly says it shall be valid. 2 Powell on Mort. 1075, Ch. Cas. 136, 2 Dick. 788, cases of judicial sales. 13 Ves. 203 as to sales to third persons 2 Call. 250; *Toon v. White*, 2 Dick. 551; 3 John. Ch. Rep. 227, 380; express as to sales. Distinction as to chattel interest, not tenable. Debt is principal, securities merely incidental. A mortgagee may sell his right, but a decree indispensable. Mortgagee is trustee—may sell and pay himself. Worth may be questionable, and value can only be ascertained in the market. If mortgagee permits sale, it is his own fault. The statute confirms master's sale—sheriff's required confirmation. (1 K. & E. L. N. Y. 443, § 13.) The mortgagee has made his election to have his debt. There have been no appeals.

Plaintiff, in reply. The English doctrine has been uniform in all its changes, in the admission of the common law rule. The opening admits it was otherwise shut. The plaintiff contends not for opening it, but that it never has been closed. If the sale was void, nothing passed, and no rights are deducible from it. This is not a case in which mortgagee can be trustee—there is nothing to trust him with; the parties are adverse to each other, and have been so throughout. Practice is merely the habit and rules of court, to give laws construction and effect, not to impugn or alter them.

August Term, 1826.

Johns, Chancellor, disavowed giving any formal opinion; barely observing, that the uniform practice, which his recollection supported, was according to

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Oct. 17, 1827.

*OLIVER, Senator. It has been well observed, that few parts of the law lead to the discussion of more extensive or useful learning than the law of mortgages.

The doctrine in relation to them has been gradually altered from their first institution till the present period, till they have now become one of the most convenient securities in use.

The leading principles in relation to them are generally well understood by community; and any innovation upon what is considered their practical effect and consequences might create serious and permanent injury.

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Ancient and
modern law of
mortgages.

Anciently there was no right of redemption in the mortgagor after forfeiture, and the British parliament in the fourteenth year of Richard the second, refused to admit it. (1, Chan. Ca. 219. Butler's Notes on Coke upon Littleton, (205 a.) note 1.)

Equity, however, soon interposed, and permitted the mortgagor to redeem after forfeiture, by paying the principal, interest and expenses of the mortgagee. This led to the process of foreclosure, and subsequently to a sale of the premises.

Formerly it was not usual to insert a power of sale in mortgages; but the insertion of this power in them is of ancient date, and is recognized by our act concerning mortgages in its sixth and seventh sections.

Practice of
foreclosure
and sale.

In the case now under consideration, it is contended that the practice of foreclosure and sale by the court of chancery, is of recent date; but this cannot be so; for Sir William Blackstone speaks of them as in use previous to the time when he wrote his Commentaries, (2 Bl. Com. 159,) which was upwards of sixty years ago.

In this state sales of mortgaged premises by the court of chancery, are believed to be coeval with the organization of that court, under the constitution of 1777. The amount

the proceedings of the defendant; that he considered this case as decided both in chancery and the supreme court; and until those opinions were reversed, he should deem them to be the law of the land.

Afterwards, on a rehearing, the chancellor assigned his reasons at large as in the principal case.

of property now held under them is incalculably great, and to question their validity at this late day, cannot be tolerated.

The sale by a master under a decree of the court, is, it is believed, tantamount to a foreclosure, and the mortgagor can no more redeem in one case than the other.

This seems to follow as a necessary consequence, if the court of chancery has power to order a sale.

This power of the court, independent of its long exercise, seems to be recognized by the eleventh section of the act concerning the court of chancery, (1 R. L. 48.) By this section, the deed of the master is made an entire bar against the mortgagor and mortgagee, and their heirs respectively.

*The sale then, by the master, and the deed pursuant to it, are an effectual foreclosure of all equity of redemption.

The purchase of part of the premises by the mortgagee, cannot vary the case. The tenth section of the act concerning mortgages, gives a mortgagee a right to become a purchaser; and provides that no sale shall be questioned on this account, either in law or equity.

The only remaining question is, whether the proceeding on the judgment upon the bond, after the sale of the mortgaged premises, opened the foreclosure, and let in the right of redemption of the mortgagee?

The cases of *Blackwood v. Blithway*, (1 Eq. Ca. Ab. 317,) *Perry v. Barker*, (8 Ves. Jun. 527,) and the same case, (13 Ves. 197,) would seem, if they are good authorities, to establish the affirmative of this question, at the common law; but the learned and eloquent jurist (Erskine) who pronounced the opinion in the book last cited, appears himself to be dissatisfied with it. He says that he was informed by the chancellor of Ireland, (Redesdale,) that the practice *there* was to take a decree of sale instead of foreclosure, and if the premises, on the sale, did not satisfy the mortgage, a suit might be brought on the bond to recover the balance without opening the decree.

This practice has long prevailed in Massachusetts, (3 Mass. Rep. 562,) and has been sanctioned by Story, J., in *Hatch v. White*, (2 Gallison, 152.) In this opinion of

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The execution of a decree of sale by a master is tantamount to foreclosure.

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Sale in this case bars equity of redemption.

Purchase by mortgagee does not vary that case.

Proceeding to collect the balance by *fa. does not* open the foreclosure.

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v.
Dickenson.

Story, J., Kent, Ch. seems to concur. (3 John. Ch. Rep 331.) It would seem to be the only equitable rule that can be adopted; and one which leads to less injustice than any other. The mortgaged premise can never be sold without giving public notice of the time of sale; and the court of chancery will do its utmost to secure a fair and advantageous sale. Thus, in case of any calamity, such as hostile invasion or extreme sickness prevailing in the place of sale at the time, the court will interfere and postpone it, (1 John. Ch. Rep. 310;) so that it is impossible that mortgaged premises can be sold without giving the mortgagor a fair chance to procure bidders. The least fraud or unfairness in the sale will vitiate it.

*403] *If, then, the mortgagee fails to collect the whole of his loan, interest and cost on the sale, why should he be compelled to lose the residue?

I think, therefore, the inherent powers of a court of equity are sufficient to sustain this proceeding. But if not, the answer upon the statute is sufficient. If our statute makes the master's deed an effectual bar to the equity of redemption, it would seem to be an absurdity, that the mortgagee, by bringing a suit, could render it ineffectual.

I am, therefore, for affirming the decree of the court below.

Decree affirmed.

THOMAS CLOWES, appellant,
against

JOHN D. DICKENSON and others, respondents.

Where one, after a judgment is obtained against him, alienates a part of his real estate on which the judgment is a lien, on motion to the court in which judgment was obtained, or on filing a bill in chancery, the judgment creditor will be compelled, by order or decree, to exhaust the estate remaining in the debtor's hands before selling the part so aliened.

And if the creditor, or any other having the control of his judgment, causes a sale of the aliened estate before resorting to the other, the latter being suf-

sufficient to pay his debt, though no order or decree be obtained, he shall restore the real estate to the alienee, or if sold by the sheriff to a *bona fide* purchaser, shall account to the alienee for the value of the real estate aliened, if the other would have satisfied the judgment, or if not, restore, or account for the value beyond what would, with the other, have satisfied the judgment.

And the alienee having stood by, and seen the legal estate pass from him, shall not be allowed the land itself, with improvements made subsequent to the sheriff's sale, and before the alienee of the judgment debtor asserts his claim.

The true value of the aliened estate in market, at the time of the sheriff's sale, not the price bid for it at the sheriff's sale, shall form the measure of compensation.

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On appeal from the court of chancery. The case below was, that Jacob I. Vanderheyden, being seised in fee of lots No. 241 and 242 in Troy, besides other real estate in Rensselaer county worth about \$20,000, if free of encumbrances, on the 10th of September, 1810, conveyed lots 241 *and 242, to the appellant, with covenants of warranty, free of encumbrances; these two lots were worth about \$1200.

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On the 8th of April, 1809, a judgment was perfected in favor of J. D. Vanderheyden, for \$3675; and on the 5th of September, 1810, in favor of John Kimberly, for \$2013, and March 27th, 1811, in favor of H. & G. Vail, for \$203; the whole against J. I. Vanderheyden, and which were liens on his real estate. Lots 241 and 242, were also included in and subject to a mortgage on them and other real estate, given by J. I. Vanderheyden, the elder, in 1792, to secure \$375, to Levinus Lansing.

Several other judgments were obtained against J. I. Vanderheyden, subsequent to the execution of the above mentioned deed to the appellant, which were liens on the residue of his (J. I. V's) real estate.

On the 13th of May, 1812, under a *fi. fa.* upon the Vail judgment, the sheriff of Rensselaer county sold all the real estate of J. I. Vanderheyden, to the respondent Dickenson, for \$3410, subject to previous incumbrances which were known to the purchaser. After satisfying the Vail judgment the residue of the \$3410 was applied in payment of judgments junior to Vail's. On the 12th of March, 1813,

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the respondents, or one of them, having purchased the Kimberly judgments, lots 241 and 242 were sold by the sheriff under a *fi. fa.* upon that judgment, for \$650 to the respondent Dickenson.

On the 6th of April, 1813, J. I. Vanderheyden died.

Upon these facts, on a bill filed by the appellant in the court below, Kent, late chancellor, decreed to him the value of lots 241 and 242; but made the 650 dollars, bid at the sheriff's sale, the measure of such value.

The decree proceeded upon principles stated by the chancellor in 5 John. Ch. Rep. 235, S. C., which see for the facts more at large.

The present appeal was from so much of that decree as fixed the standard of value at the bid of the purchaser from the sheriff.

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Clowes, appellant, in person, contended that the property itself should have been restored to the appellant, or a compensation in money decreed to him, at least, equivalent to all the damages sustained.

A. Van Vechten, contra, contended that the appellant, by not imposing his bill, to stay the sale under Kimberly's judgment and execution, acquiesced in that proceeding; and is, therefore, bound by the price at which the premises were struck off.

Either the supreme court or chancery would have ordered the execution to have been first levied on property exclusive of the two lots.

WOODWORTH, J. (After stating the facts.) The question is, to what relief was the appellant entitled? There can be no doubt, that, had he applied either to the supreme court or the court of chancery, they would have directed the execution of Kimberly to be levied on the property of Vanderheyden, not including the two lots. When that property was exhausted, and found not sufficient to satisfy the execution, then and not till then, should the lots conveyed to the appellant have been sold to make up the deficiency.[1] This is a clear principle of equity, established

[1] James v. Hubbard, 1 Page, 228, Guion v. Knapp, 6 id. 39. Eddy v. Treaver, id. 521. Gill v. Lyon, 1 John. Ch. 447.

by all the authorities; and approves itself to the plainest suggestions of natural justice. Had this course been pursued, the appellant would not have been divested of his title, as there cannot be a doubt that the residue of the property would have been more than sufficient to satisfy the execution, after making every allowance for prior encumbrances, and the voluntary or fraudulent conveyances suggested in the answer. The appellant, however, did not protect himself, as he might have done. The cause for not doing it is at present immaterial. The omission has subjected him to the surrender of some rights. Having stood by and seen the legal title divested by the sale, he cannot claim from the purchaser a reconveyance of the lots, provided the title has passed *bona fide*, and for valuable consideration, into other hands; [1] nor will equity allow him to reap the benefit of valuable improvements made on the lots subsequent to the sale, and prior to the assertion of his claim. [2] As to one of the lots, it appears to have been contracted to Mrs. Vanderbeyden, the widow, in extinguishment of her claims of dower. It is also to be inferred from the testimony of Stephen Ross, that improvements had been made. The relief, then, of the appellant, if any, must be confined to a compensation in damages for the value of the property.

It seems to be conceded that the appellant is entitled to some compensation. The decree proceeds upon this basis. It was not denied by the counsel on the argument of the cause. It seems to me, the principle being conceded, that these lots ought not to have been sold until the other property was exhausted, establishes the right to ample remun-

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Dickinson.

But the appellant not resorting to this remedy, lost his right to claim the land, and is put to his claim for compensation.

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[1] *Storrs v. Barker*, 6 John. Ch. 167. *Wendell v. Van Rensselaer*, 1 id. 354. Courts of Law in England act on similar equitable principles in regard to personal property. See *Heane v. Rogers*, 9 B. & Cres. 586. *Graves v. Key*, 3 Barn. & Adol. 318, note a. *Pickard v. Sears*, 6 Adol. & Ellis 474.

[2] If the real owner is allowed to reap such benefit, a full compensation for all such improvements must first be made. *Pillage v. Arncliffe*, 12 Ves. 84, 85. And Courts of Equity, sometimes, have obliged the real owner to permit the person making the improvements on the property to enjoy it without disturbance. *East India Co. v. Vincent*, 2 Atk. 83. *Davor v. Spurrier*, 7 Ves. 331, 5. *Jackson v. Cator*, 5 Ves. 686. *Storrs v. Barker*, 6 John. Ch. 169.

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neration. The laches or delay of the appellant, do not extinguish or lessen his claim to satisfaction. The consequence resulting from his course, is to confine his remedy to a particular channel. He cannot compel a conveyance of his lots ; but must rest satisfied with such compensation as the law allows.

Which should
not be mea-
sured by the
price at the
sheriff's sale ;
but the real
value.

In the court below the material question seems to have been, whether the sum bid at the sheriff's sale, 650 dollars, was in this case to be considered as the proper measure of damages. If the inquiry be, what is a just compensation for the value of the lots, and that I apprehend, is the proper subject of inquiry, then it must appear obvious that the amount bid at the sheriff's sale is a very unsatisfactory standard ; and particularly in cases that occurred before the redemption act, when perhaps, in nine cases out of ten, the purchases were made greatly below the real value. It is enough that such a result was probable, and as matter of history may be considered of daily occurrence. Why then should such a fallible and erring standard be assumed, as a means to ascertain value ? It may, perchance, be right in a solitary instance ; and if it happens to be so, unless there is other proof, it must be accidental. No man is bound to accept justice measured out to him by conjecture, when the fact necessary to be known is susceptible of ascertainment and proof by explicit testimony.

In the case before us, the evidence, such as it is, goes rather to show that 650 dollars was not the value. The respondents admit the lots were worth 1200 dollars, if the title had been clear. I have not discovered any evidence that the title was encumbered, except by the judgment of Jacob D. *Vanderheyden and the mortgage of Levinus Lansing. No proof was introduced to show voluntary and fraudulent conveyances, which, if they had existed, might have caused trouble and expense in getting rid of them. The prior encumbrances, then, although valid, were, in reality, harmless, when there was property estimated at 20,000 dollars from which those encumbrances might have been satisfied. I think the evidence though not full on the point, goes strongly to show that the sum bid is not a just test of

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value; and although this evidence may not warrant a correct conclusion as to the value of the lots, it affords sufficient ground for saying that the 650 dollars bid is much less than the value of the lots.

I am, therefore, of opinion, that so much of his honour the late chancellor's decree as directs the amount of the sale on the execution of Kimberly, being 650 dollars to be refunded, with interest, be reversed, and that it be referred to one of the masters of the court of chancery, to report what were the amount of encumbrances chargeable on the real estate of Jacob I. Vanderheyden, due prior to the 10th day of December, 1810; and what was the value of his real estate (not including the two lots) on which the encumbrances were a lien, on the 12th day of March, 1813, and what was the value of the lots on that day. And if, on the confirmation of the report, it shall appear that his real estate, (not including the two lots) was ample to discharge and satisfy all encumbrances prior to the 10th of September, 1810, then that a decree be entered in favor of the appellant, for the amount of the value of the two lots as reported by the master, with interest on that sum from the 12th day of March, 1813.

Savage, Ch. J. concurred.

Sutherland, J., not having heard the argument, gave no opinion.

BURROWS, CRARY, DAYAN, ELLSWORTH, ENOS, HAIGHT, HART, JORDAN, LAKE, MCCARTY, McMARTIN, NELSON, SMITH, STEBBINS, WATERMAN and WOODWARD, Senators, concurred.

For reversal,
18.

For affirmance—GARDNER, McCALL and OLIVER, Senators.

For affirmance, 3.

*Whereupon, It was ORDERED, ADJUDGED and DECREED as follows: "That so much of the decree of the court of chancery as directs the amount of the sale on the execution of Kimberly against Vanderheyden, being \$650, to be

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That part of the decree which fixes the value at the bid of the sheriff's sale should be reversed.

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refunded with interest, be reversed: and that it be referred to one of the masters of the court of chancery, to report the amount *bona fide* due on the judgments and mortgages constituting a lien on the real estate of Jacob I. Vanderheyden, prior to the 10th day of September, 1810, and what was the value of the said real estate, (not including lots 241 and 242,) on the 12th of March, 1813; and further, that the said master report the value of the said two lots on the day last mentioned; and if, on the confirmation of said report, it shall appear that the real estate of the said Vanderheyden, not including the said two lots, was sufficient to discharge and satisfy all incumbrances prior to the said 10th day of September, 1810, then that a decree be entered in favor of the appellant for the amount of the value of the said two lots, as reported by the master, with interest from the 12th of March, 1813, with costs in the court of chancery. And it is further adjudged and decreed, that in making the said report, the master shall credit and deduct from the amount of value of said lots, such sum or sums as shall appear to have been paid to the appellant, on the decrees of the court of chancery in this cause; and that the proceedings be remitted," &c.

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*THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK
OF NIAGARA, JOHN G. CAMP, and OTHERS, appellants,

against

JAMES J. ROOSEVELT and OTHERS, respondents.

W. holding a mortgage against C. & S. to secure about 6000 dollars became indebted to them in 3000 dollars on an open account; after which R. recovered a judgment against C. & S. W. subsequently assigned his mortgage to the bank of N. without endorsing or crediting the 3000 dollars. R. tendered to the bank the amount supposed to be due on the mortgage, and more; and filed a bill for redemption and assignment to him, for an account, and to have the 3000 dollars allowed on the mortgage. *Held*, that the 3000 dollars should be allowed as a set-off.

Till judgment, the parties to the mortgage might have applied the set-off to

the mortgage, or not, at their election. But by the judgment, the right of set-off became absolute in the judgment creditor.

The assignee of a mortgage takes it subject to all equities existing against it in the hands of the mortgagor; and, among others, the right of set-off. A creditor whose judgment is a lien on an equity of redemption, not coming to redeem, has a right to the assignment of the mortgage.

A general payment by a debtor who owes his creditor on two accounts, may be applied by the latter to either. *Per* WOODWORTH J., delivering the opinion of the court.

But if one of the debtor's liabilities be contingent, as if his creditor be his endorser or surety, not having paid the money, the latter cannot apply the money paid to this account. *Per* WOODWORTH J., delivering the opinion of the court.

A bank is bound by law to take its own bills or notes in payment of debts.

Per WOODWORTH J., delivering the opinion of the court.

A depositor in an insolvent bank proceeded against under the statute, sess. 48, ch. 326, s. 17, must come in for his deposit as an ordinary creditor, having no preference to others. *Brayn v. The Receiver of the Mid. Dist. Bank, note (a) to the opinion of* WOODWORTH J.,

So must a cashier of the insolvent bank, for his salary. *Id.*

Neither a depositor nor cashier have any lien on the funds of an insolvent bank; the former for his deposit, nor the latter for his arrears of salary. *Id.*

A set-off existing against a bank when it stops payment, is allowable, whether the debt of the bank be then payable, or to become due afterwards. *Id.*

Bills of an insolvent bank are allowable in set-off against the bank, whether in the debtor's own hands, or in the hands of another for his use. *Id.*

An endorser to the bank has the same right to set-off bills as other debtors; but not if he be indemnified, or the maker be able to pay. *Id.*

The evidence upon which the receiver is to act in allowing set-offs, should be such as would maintain a set-off in a court of justice. *Id.*

*If he receive the affidavit of the debtor, it should state when, where, from whom, and under what circumstances he received the bills. *Id.*

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If the debtors and sureties be insolvent, the bills of the bank may be received, whatever time they may be obtained by the debtors or sureties; but they should be estimated as much below their par value, as the debt due is probably below its par value. *Id.*

Bills obtained by the solvent debtors of a bank, after it has stopped payment, though before a receiver be appointed, are not admissible as a set-off against the bank. *Id.* [1]

An overdrawing is a debt due to a bank. *Id.*

On appeal from the court of chancery.

The case is fully stated in 1 Hopk. Ch. Rep. 579 to 582.

The decree below was against the appellants, the reasons in support of which were now given by

[1] See *Haxton v. Bishop*, 3 Wen. 13.

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SANDFORD, late chancellor, as in 1 Hopk. Ch. Rep. 533
584.

v.
Roosevelt.

J. E. Lovett & H. Bleecker for the appellants.

A. Van Vechten, contra.

WOODWORTH, J. (after stating the facts.) I have stated so much of the pleadings, as I deem necessary to present the questions on which this cause depends. The hearing in the court below, was on bill and answer; no testimony having been taken on either side. In such cases, the answer is to be taken as true.

The point.

From the statement made it will be perceived, that the material point is, whether the respondents are entitled to have the amount of 3,000 dollars advanced by the mortgagors in money and goods, applied as a set-off against the mortgage.

Neither mort-
gagors nor
mortgagee
could impair
the rights ac-
quired by the
judgment.

It will be conceded, I apprehend, that it was not competent for the mortgagors or mortgagee, to impair the rights which the respondents acquired by their judgment. For aught that appears, there was no previous lien on the lands, other than the mortgage. The respondents then took their judgment subject to that mortgage, and could not exonerate the land without paying what was due; that is to say, all payments that had been specifically made, they

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*were entitled to have credited. Such payments operated as an extinguishment of so much money secured by the mortgage. The parties to the mortgage could not, by any arrangement or agreement between themselves, defeat this right of the subsequent judgment creditor. Thus far there is no ground for controversy. In this case, the mortgagors had made advances to the mortgagee generally. No particular application of these advances had been made to the mortgage. But admitting that the mortgagors were not otherwise indebted to the mortgagee, there is no proposition clearer than that the advances constituting the sum of 3,000 dollars, were a valid set-off in

Advances
made general-
ly, which were
a valid set-off.
Till judg-
ment, this was
in the election
of the parties
to the mort-
gage.

And the right of set-off¹ passed to the judgment creditors.

law and equity, which the mortgagee could not resist, if insisted on by the mortgagors. Had no claims arising or subsequent encumbrances existed, it would have remained in the power of the parties to have applied the advances as a set-off, or not, at their election. But the moment the judgment attached, the ground was changed. The respondents then succeeded to the rights of the mortgagors, so far forth as to claim the benefit of the set-off on which the mortgagors might have relied; or, in other words, whatever was available to the mortgagors, and operated either in whole or in part as an extinguishment of the mortgage, the same defence enured to the respondents by reason of their judgment. [1]

It is well settled that where a person pays money to a creditor, who has demands against him on two accounts, the creditor may place it to which he pleases, unless the debtor directs its application. [2] (2 Cain. 99, 2 Str. 118Q). If the mortgagee, at the time the judgment was entered, had any existing debt against the mortgagors other than the mortgage, it would seem that he would have been entitled to the benefit of this principle.

The question then arises, had Williams, the mortgagee, any other debt besides that secured by the mortgage, when the respondents obtained their judgment? It does not appear that he had any. Nothing is said about a demand or even a contingent liability, until the 5th of June, 1819, at which day, the answer states, the mortgage was assigned to the bank, and that the sum of 3,000 dollars was credited as directed by the mortgagee, on a promissory note of 5,000 dollars drawn by the mortgagors and endorsed by the mortgagee.

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Money paid generally to a creditor having two demands, may be applied by him to either.

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[1] *Per* Chancellor in *Chapman v. Robertson*, 6 Page, 629. In general, the assignee of a demand takes subject to every equitable defence existing against it in the hands of the assignor. *Miner v. Hoyt*, 4 Hill N. Y. Rep. 196. *Gay v. Gay*, 10 Page, 369.

[2] See *Post*, 747. *Seymour v. Van Slyck*, 19 Wen. 19; *Allen v. Culver*, 3 Denio, 284. *U. S. v. Kirkpatrick*, 9 Wheat. 720; 5 Cond. 733. *Stone v. Seymour*, 15 Wen. 23. See further, *Dig. N. Y. Rep. by Hogan*, tit *payment*.

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Now the first objection to this is, that it no where appears when the note was drawn, nor when payable. It may have been drawn and endorsed long after the judgment. Without proof we cannot say it was not. If subsequent to the judgment, then no legal ground existed for applying the doctrine that the creditor may make application of the payment. *But suppose the note to have been endorsed before the judgment, and payable afterwards; the liability was only contingent, and constituted no *debt* within the meaning of that term. It is not competent for a creditor who has one existing debt to apply money received generally, to extinguish his liability as endorser on a note which he may or may not be compelled to pay. If the maker takes up the note, there is an end of the liability. Admitting, however, that the mortgagee in this case had become chargeable as endorser, he did not thereby become a creditor. He stood as a surety, and could maintain no action until he had paid the note. Then, and not till then, would his debt accrue against the makers of the note. I am not aware of any principle of law that will authorise the surety to exonerate himself by applying money which his principal, being a debtor on a different account, may have advanced without any particular direction. Such a doctrine would extend beyond the rule which has been sanctioned by the wisdom of the law. It does not seem to be required by the justice of the case. In the present case, however, we are relieved from doubt and uncertainty, in the absence of all evidence, that Williams, the mortgagee, at the time the judgment was entered, had any claim beside the mortgage. The consequence is, that the 3,000 dollars is a valid set-off, and must be allowed.

Effects of
the tender.

It is true that the respondents, after having paid, 3,333 dollars, tendered the further sum of 3,353 dollars, which they were willing then to pay; and demanded an assignment. The cashier received the money, and it has ever *since been held by the bank. As the assignment was refused, and the respondents were unwilling to have satisfaction entered, the business has remained *in statu quo* ever since. The respondents were driven to their suit in

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equity, and now put themselves on their rights. They are entitled to do so, the negotiation having failed.

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From this view it follows that the adjustment stated in the master's report is correct. The respondents are properly credited with the 3,000 dollars towards the mortgage; and as to the 3,353 dollars tendered and remaining in the hands of the bank, the respondents are entitled to have it refunded with interest.

The respondents coming in as judgment creditors to redeem the mortgage, are also entitled to an assignment of it, to enable them to reimburse themselves for the money advanced.

Respondents
entitled to an
assignment.

That the respondents have been benefitted by purchasing notes of the Niagara bank at a discount, cannot be urged as a ground for excluding the 3,000 dollars as a credit on the mortgage, because the stipulation to receive their bills was not accompanied by any agreement or understanding on the part of the respondents to waive that credit. Beside, the bank, without such stipulation, was bound by law to accept its own bills in payment. (a)

Bank bound
to accept its
own bills in
payment.

(a) Such is the general rule. How far it is qualified in case the bank becomes insolvent, and is proceeded against under the act, sess. 48, Ch. 325, §16, April 21, 1825, will appear by the following decision of Walworth, Chancellor, August, 1829. The first case denies the right of a depositor and cashier to a preference for the deposit of the former, or salary of the latter. The second decision is the one concerning set-off.

IN CHANCERY.

BRUYN *against* THE RECEIVER OF THE MIDDLE DISTRICT BANK.

Severyn Bruyn was the cashier of the Kingston Branch of the Middle District Bank, and at the time the bank stopped payment he was a depositor to the amount of \$105 12. He was allowed an annual salary, out of which he was to pay his own clerk, and was also to furnish a banking room for the accommodation of the branch. He claimed to retain out of the monies in the bank, at the time it stopped payment, the amount of his deposit, and an allowance for his salary up to that time *pro rata*. The receiver contended he was to be considered a mere creditor of the bank, and to receive his dividend with the other creditors. The question was by consent of the parties, submitted to the court.

A depositor in an insolvent bank must come in for his deposit as an ordinary creditor, having no preference to others.

So a cashier for his salary.

THE CHANCELLOR. The money in the bank did not belong to the cashier, but the institution. Neither the cashier nor clerk had a right to exercise

Neither have any lien for their debts, on the funds of the bank.

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*Neither does the erection of a grist mill by the mortgagors raise an equity in their favor. There was no request by the respondents to make this expenditure. If it enhanced the value of the premises, the appellants will reap

any control over it, except so far as they were authorized by the directors. The cashier had no lien upon it for the payment of his salary or deposit; and the directors could not give him such a lien under the provision of the act of 1825, in contemplation of the insolvency of the institution. It is evidence of the fairness of the officers of the branch that they were not informed of the situation of the mother bank in time to withdraw their deposits; but it is their misfortune to be left in the same situation as other depositors and creditors of the institution.

The receiver is authorized to allow such sum for the use of the banking room, and to the clerk for attending to demand payment, and protest notes which fall due, as he may deem reasonable.

IN CHANCERY.

IN THE MATTER OF THE RECEIVER OF THE MIDDLE DISTRICT BANK.

A set-off existing against a bank, when the bank stops payment, is allowable, whether the debt of the bank be then payable, or to become due afterwards.

An over-drawing is a debt due to the bank.

Bills of the bank are allowable in set-off, against the bank, whether in the debtor's own hands, or in the hands of another for his use.

An endorser to the bank has the same right to set-off bills as other debtors; but not if he is indemnified, or if the maker

The receiver of the Middle District Bank submitted a variety of questions to the court, for instructions thereon, relative to the discharge of his duties on which the following directions were given.

THE CHANCELLOR. In the case of Millery, the receiver of the Franklin Bank, on the 3d of March last, this court decided that any equitable offset which the debtor had at the time the bank stopped payment was not altered by the appointment of a receiver. It makes no difference whether the debt of the bank was then payable or has become due since. If a debtor claims to offset bills which were then in the hands of any other person for his use, the receiver should be satisfied he was the real owner of the bills at that time: and if the amount due thereon is lost, that the loss will legally and equitably fall on such debtor and not upon the person who had them for his use. If the real debtor is unable to pay, and the receiver is compelled to resort to the endorser, who is eventually to be the loser, he has the same equitable claim to offset bills which he had at the time the bank stopped payment. But no such offset should be allowed to an endorser where he is indemnified by the real debtor, or where the latter can be compelled to pay.

An over-drawing is a debt due to the bank; and if the person who has over-drawn his account was at the time the bank stopped payment a *bona fide* holder of the bills in his own right, the same rule of set-off must be applied. The evidence on which the receiver should act in allowing offsets, should be such as to satisfy him that the debtor could sustain such offset in a court of justice, if a suit was brought against him. If the receiver thinks proper to rely upon the affidavit of the party, he should at least require him to state when, where, and from whom he received the bills, and under what circumstances.

the advantage on a sale to satisfy the respondents' judgment.

I am of opinion that the decree of his honor the chancellor be affirmed.

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SAVAGE, Ch. J. concurred.

SUTHERLAND, J. not having heard the argument, gave no opinion.

BURROWS, CRARY, DAYAN, ELLSWORTH, ENOS, HAIGHT, LAKE, M'CALL, M'MARTIN, NELSON, SMITH and WATERMAN, Senators, concurred.

STEBBINS, Senator, (after stating the pleadings.) As all fraud on the part of the bank and its cashier is denied, and even all knowledge of the respondent's judgment at the time

Question is
one of strict
right.

Where the debtors and their sureties are insolvent, and only able to pay a part of their debts, it will be no injury to the creditors of the institution, if the receiver takes Middle District bills in payment; but in all such cases the receiver should estimate such bills at the probable amount of dividend which would be obtained thereon; that is, if the debtor is able to pay 75 per cent. of his debt, he should not be permitted to pay in bills at par, when they are in fact worth less than 75 per cent. in good money. In one of the suits brought by the receiver of the Greene County Bank, the supreme court decided, after full argument, that under the provisions of the act of 1825, bills which had been obtained by the debtors of the bank after it stopped payment, but before the appointment of a receiver, could not be offset; that the equitable right of the debtors to a set-off was not altered by the neglect of the attorney-general to apply and obtain the appointment of a receiver immediately. This must be considered the legal rule by which the receiver is to be governed. It having been decided there was no offset at law in such cases, there can be no pretence for claiming it in equity, as it is wholly opposed to every principle of equity and justice.

If bills of the bank were taken to exchange, and remain on hand at the time the bank stopped payment, they should be returned; but if the agent had parted with the bills, it would be manifestly unjust to allow him to receive Middle District bills afterwards to offset.

Below their par value as the debt due is probably below its par value.

Bills obtained by the debtors of a bank, after it has stopped payment, though before a receiver is appointed, are not admissible as a set-off.

is able to
pay.

The evidence upon which the receiver is to act, in allowing set-offs, should be such as would maintain a set-off in a court of justice.

If he receive the affidavit of the debtor, what it should contain.

If the debtors and sureties be insolvent the bills of the bank may be received, at whatever time they may be obtained; but they should be estimated as much

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of the assignment, the question is one of strict right whether a judgment creditor can enforce a set-off, under these circumstances against an assignee for valuable consideration.

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Ground of
decision below.

*The opinion of the court of chancery in favor of this right, seems to proceed upon the ground that the effect of the judgment against Storrs & Co. was to bind all their rights over the mortgaged premises as they existed at that time, and to substitute the judgment creditors in their place; and as Storrs & Co. then had a right to set off the \$3000 on the mortgage, this right became vested in the judgment creditors of Storrs & Co. by virtue of the judgment.

Rights of a
purchaser of
the equity of
redemption are
not in ques-
tion.

What would have been the rights of a *purchaser* of the mortgaged premises in relation to this set-off, especially if he had given immediate notice to the mortgagee, we are not called upon to determine. He might with more propriety be said to take the place of the mortgagor. He takes the land, and the mortgage debt would be cast upon him. But it appears to me that a judgment creditor stands in quite a different situation. He is in no wise the assignee of the debtor, before sale under his judgment. He has no interest in the land; but a naked lien upon it, in case no personal property can be found to satisfy his debt. He has his election to avail himself of that lien or not; and the effect of his lien upon the land depends not only upon his election, but upon other circumstances. He does not succeed to the rights of the judgment debtor even over the land. Its value may be essentially impaired by a wrong doer, and he has no remedy; his security may be lessened in many ways, and he is without redress, which belongs only to the judgment debtor. If the lien of a judgment entitles the creditor to avail himself of a demand in the hands of his debtor by way of set-off, to reduce the amount of a prior encumbrance, I perceive no reason why, upon the same principle, he might not claim the benefit of a right of action possessed by the debtor for an injury to the estate, by means of which the judgment security was diminished.

Rights of a
creditor whose
judgment
binds the equi-
ty of redemp-
tion.

Such a principle, I believe, has never been extended beyond the case of a collusion and fraudulent deterioration of

the property subject to a lien, with intent to prejudice the encumbrancer. This rests upon the familiar principle that fraud and damage constitute grounds of an action on the case. (11 John. 136.)

*I cannot agree, therefore, that the respondents, by obtaining a judgment against Storrs & Co., succeeded to the rights of set-off which Storrs & Co. might have had as against the mortgage of Williams. But what were those rights? They held a demand against Williams, and Williams held the mortgage against them. The right of set-off, (if such it may be called,) was certainly a very imperfect one, and liable to be defeated without the assent of Storrs & Co. Suppose Williams had omitted to enforce his mortgage until he had been made liable as indorser, and paid the note of Storrs & Co. in the bank, or until he had in any other way acquired a demand against Storrs & Co. to the amount of \$3,000, surely he might have met this claim of set-off by a counter claim to balance it. The right, therefore, depends upon other circumstances than the existence of the demand and the volition of Storrs & Co. Again suppose Williams had tendered the \$3,000 to Storrs & Co. I apprehend they would not have been at liberty to reject the money, and insist upon the set-off; for Williams was not bound to receive part of his mortgage debt in that way. So, too, if Williams had actually paid the \$3,000 to Storrs & Co. after the respondents' judgment, and without notice, I am at a loss to conceive why the respondents should avoid that payment; and yet it must be avoided, or the respondents' right of set-off could not be enforced. If Storrs & Co. had a perfect right to set-off this demand, and the respondents in virtue of their judgment, succeeded to that right, it certainly would not answer to suffer payment to be made to Storrs & Co.; for in this way the respondents' rights would be sacrificed; and it appears to me to be no answer to say that such payment would have enabled Storrs & Co. to re-pay the same sum to reduce the encumbrance; for however enabled they might have been to do so, there possibly might have been

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He does not acquire a right to the mortgagor's set-off against the mortgagee.

Right of set-off in this case considered, as against the mortgagee.

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an unwillingness. If the rights of the respondents, as judgment creditors, as such as are contended for, I perceive no other mode of enforcing them but by giving the judgment the same effect as an assignment of the demand by Storrs & Co. and notice to Williams, and holding all subsequent payments fraudulent.

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This doctrine appears to me to be fraught with extensive mischief. It makes the docketing of a judgment notice to all prior encumbrances to close their dealing with the judgment debtor; and as the balances may then happen to be, so they must remain until the winding up of the whole concern. If a prior mortgage or judgment creditor happens to have monies of the judgment debtor in his hands for a temporary purpose; for instance, a loan for a single day, he is not at liberty to repay it, but it must be considered a payment in reduction of the amount of his lien. It is placing the docketing of a junior judgment on the footing of the bill filed to reduce prior encumbrances; and restraining the ordinary course of dealing between debtor and creditor.

Justice requires that the rights of a junior encumbrancer should not be prejudiced by any arrangement between the debtor and a prior encumbrancer, to change the application of payments actually made in reduction of the prior encumbrance: but whether sound policy requires that a judgment creditor should, by obtaining his judgment, acquire a lien, upon the demands existing in favor of his debtor, in no wise connected with the liens upon the estate, and so inconvenient and dangerous to other creditors, is in my judgment, extremely questionable.

The right of Storrs & Co. to make this set-off, was not, therefore, an absolute right in them; but rather a privilege of which they might avail themselves, if they should afterwards happen to be placed in a proper situation to do so: a privilege depending upon circumstances beyond their control; and one to which the respondents, as judgment creditors, did not, and could not succeed.

Right of set-off as against the assignee of the mortgage.

The mortgage was assigned by Williams to the bank of Niagara for a valuable consideration, to the amount then

due upon it, in the fair course of business ; and the question then arises, what are the rights of the bank as such assignees ?

They took it undoubtedly subject to all the equity existing between the original parties ; and with this qualification our courts are in the daily habit of protecting an assignee of paper not negotiable.

At the time of the assignment, the accounts between Storrs & Co. and Williams were adjusted, and Williams paid the \$2,000 on the note of Storrs & Co. in the bank, so that beyond all doubt, Storrs & Co. would have no claim to set-off against the mortgage in the hands of the bank.

The transaction being a fair one, and the purchase having been made by the bank, not with any intent to prejudice the lien of the respondents, but to secure their own demands against the parties to the mortgage, and the amount due upon the mortgage being ascertained and assented to by both the parties to it, ought not the equity of the bank to be considered as strong as that of the respondents ?

It was held, in the case of *Henry v. Brown*, (19 John. 49,) that a debtor, who, on being notified of the assignment of his security, neglected to assert his set-off, and promised to pay the assignee, was not at liberty afterwards to avail himself of his set-off, though a fair one, existing in his favor at the time of the assignment. In this case, the respondents did not attempt to assert the claim of set-off, until long after they had actual notice of the assignment ; nor until after they had made part payment, and deposited funds sufficient for payment of the whole amount claimed by the bank.

There is much public convenience in the facilities which are afforded to the transfer of securities not negotiable by law ; and much good sense in the protection which the law proffers to the assignee of such securities. But the protection must be very insufficient, if the purchaser is bound, at his peril, to search out such complicated equities as may have existed between the parties to the instrument, at the respective periods when judgments may have been docketed

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against the obligor. (Vid. 2 John. Ch. Rep. 443, 449.) The rule, as I understand it, is a simple one, easily understood, and, under it, the purchaser always has it in his power to ascertain the true state of his security. He takes it subject to the balance of accounts between the parties to the instrument, if any balance exists in favor of the obligor at the time of the transfer. I think he is not bound to inquire into the state of accounts at any prior period,

Without further adverting, therefore, to the evidence of acquiescence in this assignment by the respondents, or to any advantage which they may have derived from the stipulation entered into by the bank as to the payment of the mortgage money, in my opinion they are not entitled, as judgment creditors of Storrs & Co., to have the demand of \$3,000, which Storrs & Co. held against the mortgagee at the time of their judgment, applied upon the mortgage in the hands of the bank of Niagara.

For affirm-
ance, 14; for
reversal, 4.

GARDNER, HART, and OLIVER, Senators, concurred.

Decree affirmed.

WILLIAM BAKER, impleaded with CHRISTIAN H. KAUFF-
MAN, appellant,
against

FRANCIS STACKPOOLE, respondent.

The admission of one partner, either of an account, or any fact, made after the dissolution of the partnership, is not admissible as evidence, to affect any other member of the firm.

A person indebted to the same creditor on different accounts or demands, and making payment, may apply the payment to which account or demand he pleases; and if he fails to make the application, the creditor may apply the payment to which account or demand he pleases.

Where neither party makes an appropriation, the law will appropriate the payment upon certain rules of presumption. The authorities to this point examined.

Where A. has a demand against B. and C. and a more recent demand against B. alone, who makes an indefinite payment, *semble* the law will appropri-

ate the payment first to the extinguishment of the individual demand, and then the residue, if any, to the extinguishment of the joint demand, though if both demands were against B. alone, it might appropriate the payment first to the extinguishment of the oldest debt.

But in such case A. cannot wait after the payment, till B. becomes farther indebted, and then appropriate the payment, to the extinguishment of the newly created demand, leaving the previous demands unpaid.

In no case can a creditor who receives payment generally, retain and appropriate it to the extinguishment of a demand created after the payment, leaving a prior demand unpaid.

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ON appeal from the court of chancery. The pleadings, report of the master, and decision of the court below, so far as they are material, were as follows :

The bill was filed September 1, 1821 ; and charged that some time in August, 1817, the defendant below, Kauffman *and the respondent Stackpoole, purchased jointly the brig William Henry, each one undivided half. That shortly after, the respondent proceeded in the brig to Havre de Grace in France, and back to New York ; the net profits of the voyage, for joint account, being upwards of \$1200, the whole of which was received by Kauffman. That after the purchase, and previous to the return of the brig to New York, the defendants below, Kauffman and Baker, formed a partnership, whereby Baker became part owner in Kauffman's share of the brig. That after the partnership, and some time in January, 1818, the respondent proceeded with the brig as master on a second voyage to Havre, with a cargo, partly belonging to Kauffman and Baker, and partly to others, on freight, the moneys received for which exceeded \$3000, which the respondent, by Kauffman and Baker's instructions, invested in merchandise, with which, and other goods on freight and passengers on board the brig, the respondent returned to New York in May 1818. That the net profits of the voyage exceeded \$2000, and all the profits and proceeds were received by the defendants below. That about the 1st of June, 1818, the defendants below, or one of them, urging the respondent, he agreed to become interested to the extent of the balance then due him from the defendants below on the account of the two previous voyages, after deducting his share of expense in fitting for

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the purpose, in a purchase of cotton for part of a cargo of the brig from Savannah to Havre. That he did not know the extent of such balance; and could not ascertain it from the defendants below. That he directed the defendants below to ship the cotton in his own name, with a separate invoice and bill of lading, which they neglected to do. That in June, 1818, the respondent sailed in the brig for Savannah, addressed to R. & J. Bolton, merchants there, by whom a cargo of cotton was furnished for the brig, partly on freight and partly on account of the defendants below. That with this cargo he sailed from Savannah to Havre, where he arrived in August, 1818; that the freight of the voyage, about \$4000, was collected by Baker in Havre, who also took charge of the cotton belonging to the respondent and the defendants below, and made arrangements for the sale and disposition of the proceeds. But Baker there declined, though requested, to give the respondent an account of his interest in the cotton; and appropriated all the freight money, alleging that he wanted it to pay a debt due from the defendants below to Opperman, Mandrott & Co., of Havre. That the brig sailed from Havre, with a full cargo, together with passengers, among whom was Baker, one of the defendants below, and arrived at New York in December, 1818; and that the freight and passage money was received by the defendants below, for which they had not accounted, and the respondent could not, therefore, state the amount. That about the beginning of February, 1819, the brig was chartered for a voyage to Limerick in Ireland, where she arrived in March following, whence she returned with passengers in August following; when the brig was libelled on a bottomry bond executed by the respondent, in the district court of New Jersey, and taken into the custody of the marshal. That the defendant below, Kauffman, who had shortly before dissolved his partnership with Baker, the other defendant below, bonded the brig, and she was released and taken into his exclusive custody; and he, without consulting the respondent his joint owner, sent her to Lisbon, with a cargo on freight, under the command of a stranger as master. That at Lisbon, a

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return cargo of salt was purchased with the freight of the outward voyage, (one half of which belonged to the respondent,) with which, and other merchandise on freight, she proceeded on her voyage for New York; but was surveyed and condemned at an intermediate port, (St. John's, Porto Rico,) as unseaworthy; and Kauffman, one of the defendants below, or his assigns, received \$2600 insurance money on the brig, \$1700 on the cargo and \$700 on the freight for the return voyage, he having abandoned to the underwriters; one half of all which sums the respondent claimed, with his wages for the whole voyage out and home; Kauffman having agreed that he (the respondent) should act as master. The respondent also claimed large sums for wages as master, against Kauffman, with large expenses and disbursements while acting as master of the brig; and that the defendants below owed the respondent \$5000 in respect to their dealings set forth in the bill; which prayed an account.

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Kauffman, (one of the defendants below,) answered, (Nov. 28th, 1821,) admitting the purchase of the brig, the first voyage to Havre and back as stated in the bill, and annexed an account with the brig and the respondent respecting the voyages; admitting the partnership with Baker, the other defendant below; but denying that Baker became interested in the brig; and asserting that he (K.) still continued to own one half, though the accounts were made out in the name of the firm during its continuance: admitting the second voyage to, and return from Havre; the outward voyage being on freight, amounting to \$2,351 88, which was invested by the consignees at Havre (not by the respondent) in plaister of Paris and hair nets, which, with merchandise on freight and passengers, formed the return loading to New York. He denied that the respondent was entitled to half a share in the brig or her earnings, he not having paid one half the price in full; but his interest was only 4 out of 11 parts; yet he admitted that (wishing to act liberally) he allowed the respondent half of the proceeds of the investment, and half the freight and passage money of the return voyage; the whole profits of the

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second voyage being only \$1,472 81, of which he annexed an account; that the brig, on her voyage from Savannah to Havre, (the third voyage,) was laden with cotton the one third of which was shipped on the joint account of the respondent and Kauffman; and he denied that the respondent's interest was limited to the extent of his moneys in the hands of the defendants below, after deducting the respondent's share of the expenses in the shipment; and denied any direction for a separate invoice and bill of lading. He admitted the sailing from Savannah with the cotton; and that the respondent paid a part of the disbursements (in the whole \$265 32) out of his own funds, Kauffman paying the residue, and insisted that the freight out was only \$3,353 56, and was collected by the consignees. He denied the other transactions charged to have taken place at Havre; insisted there was a loss on the cotton of about \$5,200; denied disbursements *by the respondent in any of the voyages; insisted that the respondent received and converted moneys to his own use; admitted the return to New York; and annexed an account of the outward and homeward voyages, showing a balance due Kauffman of \$2,638 07, including a charge for embezzlements through the respondent's neglect. The balance he carried to general account. He admitted the voyage to Limerick, where the respondent received all the freight and passage money, \$3,086; that the brig was chartered for the voyage out about the time mentioned in the respondent's bill, that the partnership of Kauffman and Baker, the defendants below, was dissolved in February, 1819, which the respondent knew before sailing on the outward voyage to Limerick; insisted that he (Kauffman) was put to damage by a seizure of the vessel at Ireland, in consequence of the illegal conduct of the respondent; that one demand, for which the vessel was libelled in New Jersey, was paid by Kauffman; that several months after her arrival there, the brig was again libelled under pretence of bottomry, in New Jersey; bonded and released to Kauffman, who prepared her for sea at great expense; and with the assent of one Smith, who claimed to be the assignee of the respondent's interest, the

vessel was sent to Lisbon on Kauffman's individual account; that the proceeds of the voyage there were laid out in purchasing salt with which, and 10 pipes of wine on freight, she proceeded on her return voyage to New York; but was surveyed, condemned, abandoned, &c., at an intermediate port, (St. Johns,) as stated in the bill. Kauffman annexed an account of the voyage from New York to Lisbon, and thence to St. Johns, showing a balance in favor of the brig of \$178 08. Accounts with the brig were also annexed to the answer, of all the voyages mentioned in the respondent's bill, and a general account with the respondent.

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On the 14th of December, 1821, Baker, the other defendant below, answered; admitting his entering into partnership with Kauffman, in October, 1817; but denying his part ownership in the brig. He insisted that the respondent was jointly concerned with Kauffman in one third of the cotton shipped on the third voyage to Havre; denied that the respondent's interest in the cotton was confined to the amount of his moneys with Kauffman or Kauffman and Baker, or any directions to ship the respondent's share of the cotton in his own name, with a separate invoice and bill of lading. He insisted that, on the contrary, whenever the respondent spoke to the defendant Baker about the 129 bales of cotton, (this being the amount of the one third in which he was interested,) he addressed himself to Baker as the half owner of it. Baker denied the transactions at Havre imputed to him by the bill; insisted that the copartnership between the defendants below was dissolved in January, 1819; and concurred in other respects with Kauffman's answer, so far as the matters in it were within his (Baker's) knowledge.

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The respondent filed a general replication; and various proofs were taken on the points disputed between the parties.

On the 19th of June, 1822, the chancellor made an order of reference to a master to take and state the accounts of the parties.

The report recited that the master had been attended by

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the solicitor and counsel of the respondent and of Kauffman; and having proceeded to take the accounts directed by the order, he found that there was due to the respondent from Kauffman \$2095 79; and stated how he disposed of a claim of commissions and port money by the respondent against Kauffman.

The master further stated that it had been admitted before him on the part of *the defendant*, "that the interest of the complainant (respondent) in a certain parcel of cotton shipped from Savannah on board the brig William Henry, on her voyage to Havre, was to the amount of his funds then in the hands of the defendants;" and the master stated, that in order to ascertain the amount, he had ascertained the available funds and cash balance in the hands of the defendants belonging to the respondent on the 8th of May, 1818, which he had taken as the date of the commencement of the adventure; that on this basis the amount invested by the respondent in the cotton was \$1341 33.

The master then, after disposing of the items charged by Kauffman for embezzlements reported that the principal questions "in dispute between the parties, arose from transactions on the voyage to Limerick, and the return to Amboy, (New-Jersey:) that the vessel sailed (with a view to this voyage) from New York in February, 1810, Kauffman then being indebted to the respondent in \$1256 20, by reason of the brig's account on the third voyage to Havre solely, (the balance of the two prior voyages being then justly held by the defendant as the amount of the respondent's investment in cotton.) That the vessel arrived at Limerick; and having discharged her cargo and procured passengers for her return home, sailed thence the 16th of April 1819. That after her arrival at Limerick, and before her being detained, (as the report afterwards mentioned,) the respondent was a creditor of Kauffman in about \$1680, charging the respondent with his share of disbursements and responsibilities of the defendant (K.) in the outfit of the vessel, and crediting him with one half his wages and other perquisites at that time, and with his proportion of the cotton sold at Havre prior thereto, (which proceeds were cred

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sted to the adventure in the books of Kauffman in May, 1819, and were credited as sold by the consignees in Havre, in March, 1819.) It appeared that the respondent received at Limerick the whole of the outward freight, and the whole of the passage money paid by the passengers, to be conveyed in her to the United States on the return voyage, amounting in the whole to \$3086 85; that one half of that sum belonging to the respondent, the other half being set off against the sum then due from Kauffman, would leave a balance against him of \$140. That the vessel proceeded from Limerick about April 15th, 1819, to Kilrush, where she was arrested by the collector for exceeding the number of passengers allowed her by act of parliament. The master then detailed the particulars of the arrest and detention, which was till the 24th of May, 1819; when the vessel was further detained for another cause, in consequence of which considerable expense was incurred and disbursed by the respondent, and by Kauffman after the vessel reached New York; but the master acquitted the respondent of all blame, and held that the expenses should be charged to the vessel. He then reported that the respondent, having applied *his receipts for the outward voyage to Limerick, to pay his own debts there, bottomried the vessel for \$2870, at a premium of \$204; and she then sailed, (July 6th, 1819.) That more money was obtained on bottomry than was necessary; and he therefore charged the respondent with all expenses resulting from it. That the vessel arrived at Amboy (N. J.) August 30th, 1819, where she was libelled for seamen's wages, the expenses of which proceeding, the master charged Kauffman. The master farther reported, that in April 1820, the vessel was libelled on the bottomry bond, but was finally given up to Kauffman, in August of the same year, upon his bond and went upon a voyage to Lisbon for him; and upon her return, was compelled to put into St. John, (Porto Rico,) where she was condemned as unseaworthy; and the defendant, Kauffman, received \$2600 insured upon her voyage, for one half of which, the master concludes, Kauffman should answer to the respondent.

The master further reported that it was proved before
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him that the partnership between the defendants was dissolved February 12th, 1819, and the dissolution, advertised in a New York paper the 19th of February, 1819; that the brig was registered at the custom house as belonging to Kauffman and the respondent, and continued so from August 16th, 1817, to April 18th, 1821, after her condemnation as unseaworthy; that on the formation of the partnership between Kauffman and Baker, the brig was brought into the books of the partnership as part of its stock, as follows, by an entry in the journal of "Capital Dr. to Christian H. Kauffman, for sundry vessels brought into the partnership concern, and, among other items, to one half of the brig William Henry, at a valuation of \$1750." The master farther reported, that some testimony had been adduced to him respecting declarations of Baker as to his part ownership of the vessel. From the whole, he concluded that no partnership was constituted between the respondent and Baker in relation to the brig, by the sub-contract between Baker and Kauffman for a participation in the moiety of her earnings, however responsible such participation may have made him to third persons; and further, if such partnership was constituted, it could bind Baker for such responsibilities only as were incurred prior to the date of the dissolution. And as by the receipt of the money at Limerick, the sum then due to the respondent on account of former voyages was discharged, the defendant Baker was not answerable to the respondent on any subsequent transactions concerning the vessel, nor for the proceeds of the cotton in which the respondent and defendants below were concerned in the third voyage to Havre, inasmuch as the proceeds were received by Kauffman after the dissolution of the partnership. This report was dated March 7th, 1823.

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To this report the respondent excepted, because the master charged the respondent's share of the proceeds of the cotton shipped to Havre, on the third voyage to that place, against Kauffman individually, whereas the proceeds were received by Kauffman and Baker, the defendants below; and the master should have charged the proceeds against them jointly.

On the 2d of August, 1824, the chancellor allowed the exception; and ordered the master to correct his report by charging the respondent's share of the proceeds of the cotton against both of the defendants below (Kauffman and Baker) jointly. The report having been corrected accordingly,

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On the 19th of July, 1825, it was confirmed; and a final decree made upon it on the 26th of October, 1825.

Baker brought his appeal to this court, from that part of the order or decree of the 2d of August, 1824, which allowed the exception.

The proofs, so far as they are material to the points decided in this court, will be found stated in the opinion of the chief justice.

D. Selden, for the appellant, made the following points:

1. The admissions made by Kauffman before the master or otherwise, were not binding upon the defendant Baker. (3 John. 536. 15 id. 409.)

2. Independent of those admissions, it appears that the losses upon the cotton absorbed the whole of the funds of *Stackpoole, as, by the pleadings and proofs, Stackpoole's interest in the adventure appears to be one half.

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3. By reason of the partnership formed between Kauffman and Baker, the relation between Stackpoole and Kauffman as owners of the vessel was not changed, and the profits belonging to Stackpoole arising out of the previous voyage are not to be considered as coming into the hands of Kauffman and Baker, but to Kauffman alone, the agent of Stackpoole, under their agreement, and his tenant in common.

4. The first Havre voyage was completed, and the second Havre voyage was commenced previous to the formation of the partnership of Kauffman and Baker. The proceeds of the voyages came to the possession of Kauffman, and if carried into the books of Kauffman and Baker, must be considered as carried to the credit of Kauffman.

5. No part of the proceeds of the cotton speculation came into the possession of the house of Kauffman and Baker;

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for that house was dissolved before the proceeds of that speculation were returned by the house of Opperman, Mandrott & Co., the consignees of the cotton at Havre.

6. If the cotton speculation should be considered as undertaken for the purpose of obtaining freight, then it must be held as constituting part of the brig's account, and not a separate account, and could therefore only be considered as a claim against Kauffman, as one of the tenants in common of the brig William Henry.

7. Even supposing that Baker might be considered as indebted to Stackpoole jointly with Kauffman, for his portion of the proceeds of the cotton adventure, yet we say that that indebtedness was subsequently discharged by Kauffman in his subsequent transactions with Stackpoole, and that funds came into the hands of Stackpoole from the Limerick voyage sufficient to discharge that indebtedness (1 Mer. 586 to 604. 14 East, 239. 2 B. & B. 70. 3 B. & A. 611.)

Lastly. The case ought to have been sent back to the master for further proof, inasmuch as the admissions of Kauffman not being sufficient to bind Baker, there was not other sufficient evidence before the master whereon to ground the *report, especially as Baker was not represented before the master.

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R. Emmet, contra.

SAVAGE, Ch. J. The principal questions arising in this case are

Questions.

1. Whether the admissions of one partner, after the dissolution of the partnership, are evidence against the other late partner ;

2. When one partner retires, leaving a balance due a third person, and the remaining partner continues to make payments to such third person, enough to discharge the balance against the late firm, but without any specific appropriation by any one, the payments being made and received on account generally, whether such payments do not discharge the balance against the firm.

I shall state only such facts as appear necessary to raise these questions.

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Case stated

On the 16th of August, 1817, the respondent and one of the defendants below, Kauffman, purchased the brig William Henry, and the respondent went in her as master on a voyage to Havre. After the departure of the brig, and before her return, the defendants below, Kauffman and Baker, entered into partnership in mercantile business. In January, 1818, the brig made her second voyage to Havre; and her earnings were invested in certain articles for the defendants below. The earnings of the brig, in this way, came into their hands, though Baker, the appellant, seems to have had no permanent interest in the brig herself.

In June, 1818, a proposition was made to the defendant, Kauffman, by the agent of Opperman, Mandrott & Co. of Havre, to purchase a quantity of cotton at Savannah, and send it by the brig to Havre, consigned to Opperman, Mandrott & Co. Kauffman proposed to the respondent to be interested in the cotton, which was assented to; but the extent of that interest is disputed; the defendants below contending that the respondent was half owner of 129 bales, one third of the cargo, and the respondent contending that his interest was only the amount of funds which he then had in the hands of the defendants below, a little rising 1800 dollars. On this speculation, there was a loss eventually, as Kauffman says, of 5,200 dollars and upwards. Of course, if the respondent was owner of one half, his loss must have been 2,600 dollars, double the amount which he claims to have been invested. If his investment was but 1,341 dollars, as computed by the master, then, by the same calculation, there were proceeds of the cotton in the hands of the defendants below amounting to 791 dollars.

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In January or February, 1819, Kauffman and Baker dissolved their partnership; Baker retiring with a gross sum, and Kauffman carrying on the business, with authority from Baker to liquidate and settle all unsettled concerns of the company.

In the same month of February, 1819, the respondent went in the brig to Limerick, and brought home passen-

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gers. He recieved the freight out and the passage money back, amounting, by the master's report, to 3,086 dollars and 35 cents, the one half of which belonged to him, and the other half, 1,543 dollars and 17 cents, is credited by the master to Kauffman. When this voyage commenced, according to the master's calculation, Kauffman owed the respondent, on account of the third voyage to Havre, 1,256 dollars and 20 cents, of which 828 dollars and 5 cents were the proceeds of the cotton and interest. But in consequence of the other charges against Kauffman growing out of the Limerick voyage, when the respondent received the sum of 3,086 dollars and 35 cents, after crediting one half to Kauffman, he was still debtor to the respondent about 140 dollars.

The principal controversy between the respondent and Kauffman, grows out of the subsequent transactions in relation to the brig; but as Baker was in no wise connected with those transactions, and as he alone appeals, I shall not pursue them farther.

Cause at issue. The cause having been put at issue, a reference was made to a master, to take and state an account between the parties.

Hearing before a master.

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On the hearing before the master much testimony was taken; but I find nothing to prove the extent of the respondent's interest in the cotton. From the testimony of Brown and Bokee, it appears to have been the subject of dispute between the respondent and Baker. The latter does not admit the claim of the former; but insists that his (the respondent's) interest was one half. It is evident from the report, that the master did not rely on the testimony to ascertain the fact. He says, "that it has been admitted before me on the part of the said defendant, (Kauffman,) that the interest of the complainant in a certain parcel of cotton, shipped from Savannah on board the said brig William Henry on her third voyage to Havre, was to the amount of his funds then in the hands of the defendants." This fact had been averred by the respondent in his bill: it was denied by both the defendants below, in their answer; and was, therefore, a fact to be proved

The admission of Kauffman was, no doubt conclusive, as to him; but did it prove the fact as against Baker? Kauffman and Baker were partners when the purchase was made of 129 bales of cotton; and also when the cotton was sold. It seems they were jointly interested in the cotton; but the partnership ended in February, 1829; and the admission was made by Kauffman in 1823. From the manner in which the case was considered by the master, it did not become necessary for him to discuss or decide upon the admissibility of such evidence as against Baker. His conclusion was, that no partnership existed at any time between the respondent and Baker; but if a partnership did exist, it could bind Baker only for responsibilities incurred prior to the dissolution, and that by the receipt of the freight and passage money on the voyage to Limerick, the sum then due to the respondent on account of former voyages, was discharged: and further, that Baker was not answerable for the proceeds of the cotton, they having been received by Kauffman after the dissolution of his partnership with Baker.

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Effect of the
admission of
Kauffman.

The respondent excepted, because the proceeds of the cotton were charged to Kauffman alone, when they should have been charged to the defendants jointly. The exception was allowed by the chancellor, who decreed that Kauffman and Baker should pay to the respondent 1124 dollars and 4 *cents, the proceeds of the cotton and interest; and that Kauffman alone should pay 1056 dollars and 75 cents, with costs against both defendants.

Exception
allowed.

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1. Were the admissions of one partner, after the dissolution, proof against the other partner as to the extent of the respondent's interest in the cotton adventure? On this question a different rule prevails in the courts of this state from the one which seems to be established in England. There the rule is, that an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner. In the case of *Wood v. Braddick*, (1 Taunt. 104,) a letter of one defendant, a former partner was produced, written after the

The admission of one partner, of an account, or any fact, after dissolution will not bind the other.

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dissolution of the partnership, acknowledging a balance due the plaintiff; and it was held conclusive against the other partner. Mansfield, chief justice, says, clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partnership, remains after the dissolution. The same rule prevails in South Carolina. (2 Bay. 533.)

In the same year with *Wood v. Braddick* in the common pleas in England, the case of *Hackley v. Patrick*, 3 John. 536,) was decided by the supreme court of this state. In that case a partnership had existed between Patrick & Henry Hastie, the latter of whom, on the dissolution, was authorized to settle the unsettled business of the firm. Two or three years after the dissolution, he acknowledged a balance due the plaintiff. Upon this admission the plaintiff sought to recover against Patrick. On the argument, the court stopped the counsel in reply, and said this is a clear case. After a dissolution of a copartnership, the power of one partner to bind the others wholly ceases.[1] There is no reason why his acknowledgment of an account should bind his co-partners, any more than his giving a promissory note in the name of the firm, or any other act. Ten years afterwards, the point was again raised before the same court, *in *Walden v. Sherburne*, (15 John. 424.) In that case *Wood v. Braddick* was cited, and presented to the court as containing the true principle; but Spencer, justice, in giving the opinion of the court, says, "According to the decision of this court in *Hackley v. Patrick*, (3 John. 536,) one partner cannot, after a dissolution, bind his copartner by acknowledging an account, any more than he can give a promissory note to bind him. It seems that the court of common pleas in England have held otherwise; (1 Taunt. 104;) but I believe there is more safety in the rule of this court than in a contrary one. For about twenty years the rule has been considered settled as laid down in *Hackley v.*

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[1] *National Bank v. Norton*, 1 Hall 572. *Briston v. Boyd*, 4 Page 17: *Vind Karen v. Parmelee*, 2 Conn. 522. See *Ante, Gleason v. Clark*, 50 n. 1.

Patrick; and has been very recently recognized by the supreme court. (Hopkins v. Banks, 7 Cowen, 650.) I would not, therefore, unsettle it, even if I thought the English rule the more correct.

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A distinction was attempted, upon the argument, between the admission of an account and the admission of a fact; but I can perceive none in principle. The same consequence follows. The admission of the fact determines the amount of liability which attaches to the other partner, with as much certainty as if Kauffman had admitted the amount of the proceeds of the cotton in the hands of the firm.

If, therefore, the court below erred, as I think it did, in considering the fact proved as against Baker by the admission of Kauffman, it follows that the case must be sent back to that court, with instructions to refer it again to the master, unless upon the other point in the case such reference becomes unnecessary.

2. I proceed, therefore, to inquire, whether the respondent's claim for the proceeds of the cotton, was extinguished by the moneys received at Limerick.

In discussing this point, I must necessarily consider the evidence sufficient to charge Baker with the proceeds of the cotton, though I have endeavored to show that that fact has not been proved by competent testimony, so far as regards Baker.

*For the purpose of the argument, then, I am to consider the proceeds of the cotton, 828 dollars and five cents, in the hands of Kauffman and Baker, before the commencement of the voyage to Limerick. At Limerick the respondent received money of the defendant Kauffman, amounting to 1,557 dollars and 60 cents. Nothing was done at the time which amounted to an appropriation of the money to any particular demand. The respondent had in fact a demand for the cotton, and no other, except disbursements by him, on account of that voyage.

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There is no doubt but a person indebted to the same creditor on different accounts or demands, making a payment makes payment, the debtor may apply the payment to which account he pleases. If he does not do so the creditor may take the application.

Where one
indebted
to
another on two
different ac-
counts

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If no appro-
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either, how the
law makes it.

Authorities.

ment, may apply the payment to any demand he pleases ; and if the debtor fails to make the application, or rather appropriation, the creditor may make such appropriation as he pleases. [1] But if no appropriation is made by either, but the money is paid and received generally on account, how does the law make the appropriation ? In *Goddard v. Cox*, (2 Str. 1194,) it was decided that in such case the creditor has the right of applying when there is no dispute about liability ; but if the debtor is liable in one demand personally, and in another as executor which depended upon the question of assets, then the creditor cannot make the application to such demand. The case of *Devaynes v. Noble*, Clayton's case, (1 Mer. 584 to 610,) gave rise to much discussion as to the rules governing the application of indefinite payment. Sir William Grant, master of the rolls, examined the subject at some length ; but his decision did not rest upon it, as he distinguished the case before him from all the cases which had been cited. He considered the rule of the civil law to be, that the election, whether by debtor or creditor, should be made at the time of payment ; and if neither applied the payment when made, then the law made the payment upon certain rules of presumption ; and in applying presumption, the presumable intention of the debtor was first considered. The master of the rolls considered the case of *Goddard v. Cox*, (2 Str. 1194,) and the cases of *Wilkinson v. Sterne*, (9 Mod. 427,) *Newmarch v. Clay*, (14 *East, 239,) and *Peters v. Anderson*, (5 Taunt. 506,) as establishing this proposition : that in the absence of any express appropriation, it is the presumed intention of the creditor which is to govern ; and he may, at any time, elect how payments made shall retrospectively receive their application. While he admits the rule thus established by those cases, he considers it an extension of the original rule. *Meggot v. Mills*, (Ld. Raym. 287,) and *Dawe v. Holdsworth*, (Peake's N. P. Cas. 64)

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[1] *Bank Niagara v. Rosevelt*, ante, 411, n. 2. *U. S. v. Wardwell*, 5 Mason, 82. *Hillyer v. Vaughn*, 1 J. J. Marsh, 583. *Hammer's adm'n. v. Rochester*, 2 id. 145. *Burke's adm'n. v. Albert*, 4 id. 97. *Bacon v. Brown*, 1 Bibb, 324, Post 746, 773-777. See also, 5 Denio 470, 3 Denio 248 ; 15 Wen. 23 Am. Ch. Dig. by Waterman, tit. Debtor & Creditor.

were decided apparently upon the original rule of the civil law; but they are said by Chief Justice Gibbs to be distinguishable on the ground that the defendant would have been liable to be declared a bankrupt, unless the payment had been appropriated to the prior debt. Clayton's case was decided on the ground of there being no distinct demands in his favor against the banking house; but one continued running account; and in that case the drafts were held to apply to the oldest deposits. But this case is distinguishable from that. Here the respondent had distinct demands against different individuals; and when a payment was received by him, or moneys of Kauffman came into his hands, he might have good reason for applying such money to a recent indebtedness of Kauffman alone, and retaining his claim upon the firm for what was due upon the cotton adventure. It will be seen, however, that the moneys received at Limerick were sufficient to discharge his individual claims upon Kauffman, and the joint claim upon Kauffman and Baker also, except \$140. No case has been cited, and I presume none can be found, carrying the creditor's right so far as to retain money in his hands to apply upon any future indebtedness, leaving a prior demand unpaid. The moneys received by the respondent, therefore, should be applied to pay, as far as they went, all the claims he had, giving him the election in the appropriation. According to this rule, if we consider the liability of Baker established by the admission of *Kauffman, still the decree against both defendants is for too much.[1]

- Whether, therefore, Baker is liable or not, the decree of his honor, the chancellor, should be reversed, and the cause sent back to the master for further proof.

WOODWORTH, J. and the whole court concurred in this opinion, except

[1] In *Van Bessellaer's ex'rs v. Roberts*, it was decided, that where one individually and jointly indebted with another, to the same creditor, makes a general payment, the creditor may apply it to the joint account, although he has given the party who paid him, a receipt, in which the name of the other joint debtor was not mentioned. 5 Denio, 470.

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Where A has a demand against B and C, and a more recent demand against B alone, who makes an indefinite payment, *sensu* the law will appropriate the payment first to the individual debt, and the residue, if any, to the joint debt: though if both debts were against B alone it might appropriate the payment to the oldest debt first.

But in such case the creditor cannot wait till B be-

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comes farther indebted, and then appropriate the payment to the future debt, leaving the previous one unpaid.

In no case can a creditor who receives payment generally, appropriate it to a debt created after the payment, leaving a prior demand unpaid.

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SUTHERLAND, J., who not having heard the argument, gave no opinion.

McCartee

v.

Orphan Asylum Society.

ORDERED, ADJUDGED AND DECREED, "that the decree of *his* honor, the chancellor, appealed from in this cause, be reversed;" and that the record and proceedings be remitted, &c.

PETER Mc'CARTEE, one of the executors of the last will and testament of Philip Jacobs, deceased, appellant,

against

THE ORPHAN ASYLUM SOCIETY OF THE CITY OF NEW-YORK, respondents

J. being seised of real estate, devised that if, at his death, he should have a child living, the rents and profits should be received by his executors, and applied for the support, &c., of the child, the surplus to be invested in stock to accumulate and be paid over to the child at 21, or marriage. He gave all the residue of his real and personal estate, after payment of all legacies and other bequests, to a corporate company, (the Orphan Asylum Society in the city of New York,) the bequest to take effect immediately, after debts and legacies paid, if he should leave no child; or, if he should leave a child, then, upon the child's death, intermarriage or attaining 21. The will then gave to his executors all his real estate, subject to the trusts aforesaid, and declared his will to be, that when such child should attain 21, or marry, his real estate should be sold by his executors, and one-half of the proceeds paid to the child, if it should attain 21, or marry. The testator died seised, and a posthumous child was born to him, which died before 21, and unmarried. *Held*, that the devise to the corporation was direct on the death of the child, and not a trust for the corporation; and so the will was, in this respect, void as to the real estate within the statute of wills, (sess. 36, ch. 23, s. 1, 1 R. L. 364.)

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*Otherwise, it seems, had there been a trust: insisted on at large, in the dissenting opinion of Stebbins, senator, and supported by Jones, chancellor, *arguendo* for his decree.

The act incorporating the company, (sess. 30, ch. 179,) authorised them to take by purchase, (§ 1.) *Held*, that the term purchase should be taken in its popular, and not in its broadest legal sense, so as to include a devise. Dissenting view of this question. Per Cary, senator.

Two statutes shall stand together, and both have effect if possible; for the law does not favor repeals by implication; and all acts *in pari materis* should be taken together, as if they were one law.

An act of incorporation, authorising a company to take by purchase, means

subject to the restrictions and incapacities created by other general statutes.

The right to purchase is incident to a corporation.

The right to devise existed at common law. Per Crary, senator; Stebbins, senator, contra; and that it depends on statute.

The words rents and profits, in the statute of wills, do not include a use. Per Stebbins, senator.

The statute of wills is an enabling, not a prohibitory statute. Per Stebbins, senator.

The reason why devises to corporations were excepted in the statute of wills. Per Stebbins, senator.

Difference between an incapacity to devise, and a prohibition to take. Per Stebbins, senator.

Incapacity to devise land will not prevent the devise of a use. Per Stebbins, senator.

Brief historical view of uses and trusts. Per Stebbins, senator.

It has been held that a feoffment by the husband to A. for the use of his wife is executed by the statute of uses, though the husband could not convey directly to his wife. Per Stebbins, senator.

On failure of a trustee, a court of equity will appoint another. Per Stebbins, senator.

The statute of uses will not execute upon a use. Per Stebbins, senator.

The English statute of charitable devises, of devises in mortmain or of wills or devises to corporations; and the common law, and the rules of the English chancery on these subjects, independent of statutes, and a comparison between the English and New York statute law on these subjects, and a very full review and history of the cases on the same subjects, both English and American. Per Jones, chancellor, assigning reasons for his decree.

Though a devise directly to a corporation may be void by the statute of wills, (1 E. L. 364,) yet a devise to a natural person, in trust for a corporation, is good. Resolved by the chancellor, and not questioned by the court of error. Vid. Jones, chancellor's argument in support of his decree; and the view of this question by Stebbins, senator.

The wife may convey land to her husband by first aliening, with her husband to a stranger, who may alien to the husband. Per Jones, chancellor, *arguendo*, in support of his decree. Recognized per Stebbins, senator, who says an indirect mode of conveyance is no fraud upon the law, when resorted to in order to remedy a want of capacity to convey directly.

The rule that what cannot be done directly shall not be done indirectly, applies only to an act prohibited by statute, or one which is morally wrong, or one which is intended as a devise to evade an express provision or rule of law. It has no application to mere incapacity, when the act to obviate the incapacity contravenes no statute regulation, nor violates any principle of law. Per Jones, chancellor, *arguendo* in support of his decree.

Goods conveyed to a trustee for the use of his wife, places them beyond the control of the husband. Per Jones, chancellor, *arguendo* in support of his decree.

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Jurisdiction of the court of chancery in the case of charities, considered and vindicated. Per Jones, chancellor, *arguendo* in support of his decree.

A trust shall not fail for want of a trustee, and cases showing this. Per Jones, chancellor, *arguendo* in support of his decree; and per Stebbins, senator.

Extent of the word *purchase*. It includes devise. Per Jones, chancellor, *arguendo* in support of his decree and the cases cited by him; and per Woodworth, J., delivering the opinion of the court of errors; and per Crary, senator.

On appeal from the court of chancery. On the 20th of March, 1825, the respondents filed their bill in the court below, against the executors of Philip Jacobs, deceased, to recover a devise and legacy made by his last will and testament to the respondents. The testator being seised of a large real estate, made his will, dated September 7th, 1818, by which, after directing his debts and funeral expenses to be paid, and after a number of bequests and directions, and among others, the bequest of a pecuniary legacy to the respondents, he declared that if, at the time of his decease, there should be any child of his living, all the rents and profits of his real estate should be received by his executors, or the survivors of them, and be applied to the support, maintenance and education of such child; the surplus if any, to be from time to time invested in stock, to accumulate for the child's benefit, and to be paid over to such child at the age of 21 years or marriage. The will also declared, that the testator did thereby give, devise and bequeath all the residue of his estate real and personal, after the payment of all legacies and other bequests, to the *Orphan Asylum Society of the city of New York*, (the respondents,) to be applied to the charitable purposes of the institution; the bequest to take effect immediately after debts and other legacies were paid, if the testator should leave no child at the time of his death, or, if he should leave a child, then upon the death, intermarriage, or the attaining the age of 21 years by such child. The will then proceeded, "*Item*, I do thereby devise and bequeath unto my said executors, and the survivor or survivors of them, or such of them as may act in the premises, all my real estate, of whatsoever nature or

kind the same may be, subject to the trusts aforesaid. And it is my will, that whenever such child shall attain the age of 21 years, or marry, that my real estate be sold by my said executors, or the survivor or survivors of them, or such of them as may act herein, and the one half of the proceeds thereof paid to my said child, if the child shall attain the age of 21 years, or marry."

The testator died, seised, as at the date of the will, on the 6th of October, 1818, without revoking his will, and leaving his wife Elizabeth surviving, of whom shortly after his death, and on or about the 23d of January, 1819, a posthumous child, a daughter of the testator, was born, which child lived till the 5th of April, 1821, when she died.

July 8th, 1826, the court of chancery decreed, that upon the death of the child, the respondents became entitled, for the benefit of the charity for which they were incorporated, to the estate both real and personal, of which Jacobs died seised, subject to the rights of the widow, &c.

The object of the appeal was to reverse the decree, so far as it respected the real estate.

The reasons for the decree, at the time of making it, were assigned by Jones, chancellor, and were now presented to this court as follows:

JONES, Chancellor. This case arises upon the will of Philip Jacobs, who, by his will, after directing his debts and funeral expenses to be paid, and after a number of bequests and directions, and amongst others, the bequest of a pecuniary legacy to the complainants, declares his will to be, that, if at the time of his decease, there should be any child of his living, all the rents and profits of his real estate should be received by his executors, or the survivors of them, and be applied to the support, maintenance and education of such child; the surplus, if any, to be from time to time invested in stock, to accumulate for the child's benefit, and to be paid over to such child at the age of twenty-one years, or marriage; and the testator did thereby give, devise and bequeath all the residue of his

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estate, real and personal, after the payment of all legacies and other bequests contained therein, to the Orphan Asylum Society in the city of New York, to be applied to the charitable purposes of the institution; the bequest to take effect immediately after all other debts and legacies were paid, if he should leave no child at the time of his death; or if he should leave a child, then upon the death, intermarriage, or the attaining of the age of twenty-one years of such child. *Item*, he devised and bequeathed unto his executors, and the survivor and survivors of them, or such of them as might act in the premises, all his real estate, of whatever nature or kind the same might be, subject to the trusts aforesaid, and declared it to be his will, that whenever such child should attain the age of twenty-one years, or marry, his real estate should be sold by his executors, or the survivors or survivor of them, or such of them as might act therein; and the one half of the proceeds thereof paid to his said child, if such child should attain the age of twenty-one years, or marry; and he appointed the defendants, Peter McCartee, Richard Cunningham and John Anthon, the executors of the will.

The testator died on the 6th of October, 1818, without revoking his will, and leaving his wife Elizabeth him surviving. Shortly after his death, and on or about the 23d of January, 1819, a posthumous child, a daughter of the testator, was born, and which child lived until the 5th of April, 1821, when she died.

The child having died within the age of twenty-one years, and before marriage, the complainants claim to be entitled to the benefit of the whole residuary estate of the testator. The right to the personal property is not contested, but the claim to the benefit of the real estate is resisted, on the ground that the complainants, being a corporate body, are disabled by the statute concerning wills to take an interest in land by devise.

By the act concerning wills, it is provided, that any person having any estate of inheritance, either in severalty, in coparcenary, or in common, in any lands, tenements or hereditaments, may, at his own free will and pleasure, give

and devise the same, or any of them, or any rents or profits out of the same, to any person or persons, (except bodies politic and corporate,) by his last will and testament, or by any other act by him lawfully executed.

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It is contended, that the power to dispose of real estate by devise, is derived from this statute exclusively, and that the testator was prohibited by the exception from devising the interest intended for the complainants, either to them directly, or to his executors, for their benefit.

The intention of the testator to bestow his bounty on the complainants, is not denied, but it is contended that this benevolent intention cannot be carried into effect by this court, because the charity is to be administered by an incorporated society; and if there be any prohibition of law that applies to the case, this court, however much it might lament the necessity of turning the proffered charity from the interesting objects to whose succour it was devoted, is bound to give that prohibition its legal effect. But the will of the testator, in subordination to the settled principles of law, and the positive injunction of statute regulations, is the rule for the disposition of his estate, and in a struggle between the heir or trustees, whom the testator obviously did not intend to benefit, and a charity which he confessedly designed to endow, a court of equity will lend its aid to the extent of its legitimate powers to uphold the devise, and effectuate the laudable and meritorious purpose of the testator.

The question is, whether effect can be given to the intention of this testator, or whether his charity is forbidden by the rules of law. It is an interesting question. I have approached it with diffidence, but I have bestowed upon it the best consideration in my power to give it, and have arrived at conclusions which have satisfied my mind, and must govern my decision.

It is objected to the validity of the devise, that the estate, by the legal effect of the will, vests in a body corporate, and I consider the defence which grows out of that objection as resting upon these grounds: First, that this devise is to the corporation within the meaning of the statute.

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Secondly, that a devise to a corporate body, though for charitable purposes, and not for the general use of the corporation, is nevertheless unlawful; and *Thirdly*, that this corporation comes within the prohibition.

First, then, is this a devise to a corporate body, within the meaning of the exception in the act concerning wills?

The fair construction of the will appears to me to be a devise by the testator of all his real estate to his executors as trustees upon trust, that in case he should leave a child (and which case occurred,) the rents and profits should be received, taken and applied, by his executors and trustees, for the benefit of such child, until the child should arrive at the age of twenty-one years, or marry, and the estate on the arrival at the age of twenty-one years, or marriage of the child, to be sold by the acting executors, and one half of the proceeds thereof paid to the child, and the other half to the complainants; and in case of the death of such child within the age of twenty-one years, and before marriage, then upon trust to hold and dispose of the whole estate, and the proceeds thereof, to and for the *Orphan Asylum Society, in the city of New York*, (who are the complainants,) to be applied to the charitable purposes for which the association was established. The testator, it is true, by the terms of one of the clauses of his will, devises and bequeaths all the residue of his real and personal estate, on the contingencies therein mentioned, to the complainants; but by another clause of the will, he expressly devises all his real estate to his executors, subject to the trusts of the will. These two clauses must be construed together; and to give effect to both, the legal estate must be held to vest in the executors as trustees, and the beneficial interest in the complainants, and the child, according to the trusts of the will. This will, then, did not create an immediate devise of land, or of any rent or profit out of land, to the corporation. The devise is to the trustees, and the beneficial owners took an equitable interest only as *cestui que trust*. The testator left a child. During the life time of that child, the rents and profits of the whole real estate, so vested in the trustees, belonged

exclusively to her. If she had attained the age of twenty-one years, or had married, the estate, according to the trust, was to be sold by the trustees; and one half of the proceeds paid to her, and the other half part thereof to the complainants. Suppose the child had lived to the age of twenty-one years, or had married, and the estate had been sold by the executors pursuant to the trust, would not the devise of a moiety of the proceeds to the corporation have been, in such case, a valid and available disposition of it to them; if so, the trust for the corporation was valid, and effectual at the time of the death of the testator, and during the life time of the child, and upon the death of the child, the lands would remain, and thereafter be vested in the executors, to whom they are devised by the will upon trust to hold the same, for the use and benefit of the complainants.

But the validity of this trust for the complainants is strenuously contested. The objection to it is, that being a trust of land for a corporation, it was in effect a devise of the land to the corporate body, and it was broadly contended that the devise of land to trustees for the benefit of a corporate body is void, and the principle was pushed to the extent of insisting, that a devise of the proceeds of land directed by the will to be sold, is equally within the prohibition of the act as the devise of the land itself. The position is, that the complainants, notwithstanding the form of the devise, are to be regarded as standing on the same ground as if they were the immediate devisees of the land. To this position I am not prepared to yield my assent; and a brief examination of the authorities adduced in support of it will best explain the grounds of my dissent from the doctrine it involves.

For the support of the principles contended for, the authority of Fonblanque's Treatise on Equity, (vol. 2, p. 212, book 2, ch. 1, sec. 2, note 2,) and the cases there collected and cited, were relied on. These authorities give an exposition of the statutes of mortmain now in force in England; and the doctrine advanced by Fonblanque in his note, and confirmed by the decisions to which he

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refers, is deduced chiefly from the statute of (9 Geo. 2, ch. 36^a) usually denominated the statute of mortmain.

*That statute provides that no lands, tenements, rents, &c., or money, goods, chattels, stocks in the funds, securities for money, or personal estate to be laid out in land, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any way conveyed or settled to or upon any person or body corporate, or otherwise, for any estate or interest whatever, or any ways charged or encumbered by any person, *in trust or for the benefit* of any charitable use, unless by deed, executed in the presence of two witnesses, twelve calendar months before the death of the donor or grantor, and enrolled in the court of chancery within six months next after the execution thereof; and the third section of the act makes all gifts, &c., not executed and enrolled according to the directions of the statute, absolutely null and void. [1]

A reference to the cases cited by Fonblanque in support of his positions, will show that they were all decided on the construction of that act, with the exception of that of *Le Costa v. De Pas*, and perhaps that of *Gravenor v. Hallum*.

Thus, in the case of the *Attorney-General v. Ld. Weymouth*, (cited from *Ambler*, 20,) a testator devised lands to trustees to be sold, and the residue of the proceeds, after certain bequests first satisfied thereout, to be paid in moieties to two several corporate bodies, for charitable uses. The attorney-general filed an information against the trustees, who had taken possession of the lands, to have the same sold, and the proceeds applied to the trusts directed by the will. The statute of 9 Geo. 2, cap. 36, was set up as a defence; and the court held the words of the act to import, that it should not be in the power of any person to convey the lands themselves, nor to charge or incumber them, for the benefit of a charity, unless by deed, executed

[1] By the Revised Statutes (see 4 ed. 241, § 3,) a devise of real property, in trust for a corporation, is void, unless expressly authorised by its charter, or by statute, to take by devise. *Theological Seminary of Auburn v. Childs*, 4 Page, 419. See also *Wright v. Methodist Episcopal Church*, 1 Hoff. Ch. R. 225.

and enrolled according to the directions of the statute ; and that the will in question was a devise of the land itself, and a gift of money, contrary to the prohibition of the act. The chancellor considered it a devise of the land, because it was a gift of the rents and profits *until sale, and none but the charity had a right to compel the sale ; but he held it immaterial, whether it was a devise of the land or money ; both were prohibited, and all charges and encumbrances for the benefit of the charity made void. This decision, then, was clearly founded upon the special provisions of the statute against charging or encumbering lands for the benefit of a charity, on the ground that the directions to turn the whole real estate into money for the charity, must be within the prohibitions, which forbid the party even to create a charge upon it, or to direct a specific sum to be paid out of it for that purpose.

The cause of *Mogg v. Hodges*, (reported in 2 Vesey, Sen. 52,) went upon the same ground. The testatrix devised her real estate to be sold, the proceeds to be applied to the uses of her will, and then directed her debts and legacies to be paid out of the personal estate, and made the executors trustees, leaving them all the residue of her personal estate, and of the money to be raised by the sale of the real estate, to be given by them in what parities they should think proper, particularly recommending to them the hospital of Bath. The trustees agreed, that as all money arising from a real estate is to be accounted as real, the bequest was so far void by the statute of 9 Geo. 2 ; but their desire was that, in compliance with the intent of the testatrix, the assets might be so marshalled, that all the other legacies should be paid out of the real estate, and so the personal go to the charity ; but the chancellor said that it would be contrary to the express direction of the testatrix, who had ordered her debts and legacies to be paid out of her personal estate, and he thought himself not warranted to set up a rule of equity contrary to the common rules of the court, merely to support a bequest which was contrary to law. From this case, it appears to have been already settled, that the rule which prevails in courts of equity, that

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money arising from the sale of real estate continues in equity to be real estate, was to be applied in the construction of the statute of 9 Geo. 2, for it was admitted to govern the case as bringing the devise within the provisions of the act.

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*The same principle was applied to the case of *Arnold v. Chapman*, in 1 Vesey, Sen. 108. The testator in that case devised a copy-hold estate to the defendant, Chapman, he causing to be paid to the executors \$1000, and then devised the residue and remainder of all his estate, after debts and legacies paid, to the governors of the Foundling Hospital and their successors forever; and it was held by the court that the law would not allow the sum thus made payable by the defendant to the executors, to go to the charity, because it was in effect a charge upon the copy-hold; and the chancellor said, that had the testator devised the copy-hold estate, on condition to pay \$1000 to the governors of the Foundling Hospital, it would have been void by the statute; and that he had done the same thing in substance in another mode by including it in a residuary bequest of real and personal estate; that if that was allowed, the act would easily be evaded, by directing the real estate to be sold, and the money given to a charity; but that it had been determined to amount to a devise of the land itself, because all charges, trusts and uses of money, devised out of land to a charity, are made void by the act; for whatever is taken out of real estate shall be considered as real; and this would be taking so much out of the real estate for the charity, which therefore shall not go to it.

In the case of *De Costa v. De Pas*, (Ambler, 228,) there was a bequest of personal property for a use to which the law of England did not permit it to be applied, and the question was, to whom it should belong, whether to the next of kin or to the crown, to be disposed of as a charity? In that case, a Jew, by will, made after 9 Geo. 2, ch. 36, established a fund, to be so appropriated as to apply and dedicate the revenues of it towards the establishment of a *Jesuba*, or assembly for reading the law and instructing people in the Jewish religion. Lord Hardwicke held the

devise to be in itself a charity, but that it promoting a religion contrary to that by law established, could not be supported on the particular application of it directed by the testator, and was to be applied to such charitable purposes as the crown should direct.

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In the case of the Attorney-General v. Graves, (cited from Ambler, 155,) there was a devise of a residue of real and personal estate to charitable uses, part of which residue consisted of a term not carved out of the inheritance by the testator, but vested to him as trustee. The question was, whether it was within the statute of 9 Geo. 2, and void; and the chancellor declared it to be both within the intention and words of the statute. In this case the chancellor gives his construction of the statute, and shows the ground on which he went in determining the points arising under it; and in that view the case furnishes a key to other decisions.

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It was contended that the lease coming from another, was personal property, and might well be disposed of to charitable purposes: and it was urged that the words "any estate or interest whatsoever," made use of in the statute, were to be held to mean only that a person should not devise his own land for any estate or interest whatsoever; but the court overruled the construction, and held that the words relate back as well to lands and tenements as to personal estate, and that the annulling clause, which affords a construction of the other, annuls all estates or interests in lands and tenements, and there is no color for the distinction on the latter words.

In the case of Gravenor v. Hallum, (Ambler, 643,) the devise was of a messuage, subject to annual payments to the amount of £10, therein after given, and by the will forever charged on the premises; which messuage, together with all the testator's other real estate, was directed to be sold, and after directions given by the will for the disposition of the proceeds, the annual sum of £10 was also disposed of, two sums of twenty shillings each to the churchwardens of two different parishes forever, to be laid out in

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repairing his family vaults in each of those parishes, and the residue to charitable uses.

The gift of the residue was admitted to be within the statute, and the question was upon the bequest of the two sums for the repair of the family vaults; but the court said that the two sums on which the doubt was made, were given to church-wardens, who are not a corporation to take, and therefore are void at law, and being so, a court of equity would not appoint new trustees to set them up. But it was *further declared, that they were not blended with the charity, but were distinct sums, directed to be applied to that particular use; and though the church-wardens could not take, yet the devise was good, and the heir at law was a trustee.

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Attorney-General v. Meyrich, (2 Vesey, Sen. 44,) was the devise of money due on mortgage, to trustees for the charitable purpose of establishing a school for teaching poor boys. The question was, whether the devise of this debt secured by mortgage on real estate, was within the act, and the court held that it was. The chancellor declared that the design of the act was to lay a restraint on every method whereby lands might probably come to such hands, unless by the manner therein prescribed; that money due on mortgage was a charge and encumbrance on land, and within the express words of the third clause of the act, the meaning of which was, that you shall not give to a charitable use that which is or may be a charge on land, though not so at the time of the gift; that a sum of money devised to be put out on mortgage of freehold land, would be restrained by the act, and it could not vary the case, that at the time of the gift the money was actually so vested; that he thought mortgages were prohibited by the first clause; but, if doubtful on the first, the words of the other clause take it in expressly.

The case of the Attorney-General v. Cock, (2 Vesey, Sen. 273,) was the devise of an annuity to a Baptist minister, and his successor in office: and was held to be valid, and established on the ground that the charity and the death of

the testatrix were long before the mortmain act of 9 Geo. 2.

The last case cited is that of *Corbyn v. French*, (4 Vesey, 418,) which was the bequest of a pecuniary legacy of £500 to the trustees of a chapel, to be applied by them towards the discharge of a mortgage on the chapel; which mortgage was paid off in the life time of the testator; and the question was, whether the bequest of the money to be applied in the redemption of the mortgage, being in its nature a charitable use, was not within the prohibition of the act of 9 Geo. 2; and if the legacy was not void under that statute, whether, as at the death of the testator, the mortgage was paid off, and that object therefore could not be obtained, the trustees were *entitled to the legacy for the general benefit of the charity. The master of the rolls declared himself in favor of the residuary legatees on both points. He determined the first point, which is the material one, upon the construction of the third clause of the act, which he considered as declaring all gifts, grants, conveyances, &c., of any lands tenements, or other hereditaments, or of any estate or interest therein, or of any charge or encumbrance affecting or to affect the same, or of any personal property, to be laid out in the purchase of land, &c., or of any estate or interest therein, or of any charge affecting the same, to or in trust for any charitable use whatever, made in any other manner than as by the act directed, to be absolutely void; and the question was, whether the legacy was not to be applied in the purchase of an interest in land, or a charge or encumbrance affecting the same, and he held that it was a bequest of money to be applied in the purchase of an interest then affecting the premises.

The interest in the land which was covered by the mortgage, was not vested in the trustees; they had all the estate but that mortgage interest, and the purchase was to give those trustees who had the estate, subject to that interest which was in other persons, a larger and more extensive interest than they had before. It was the gift of a sum of money for the purpose of purchase, first, and then conveying to the trustees that further interest in the land,

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and it was therefore within the statute; and he said that it had been decided that a sum of money secured on turnpike tolls, is an interest in land within the act; and he added, that the legacy given to enable the trustees to complete the purchase of an estate contracted for by the trustees, would be within the statute and void.

These are all the cases cited in support of the position that the devise of lands to trustees for the benefit of a body corporate is void, and to show that the devise to a corporation of the proceeds of lands devised to trustees to be sold is unlawful; and the review of them shows that they were all decided subsequently to the act of 9 Geo 3, and most of them on the construction given by the courts to that statute.

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* Now the object of that statute obviously was, to suppress and abolish devises of land and interests in real estate to charitable uses; for it prohibits all devises and donations of land, and of estates and interests in land, and charges upon real estate, to charitable uses, whether to corporate bodies or to natural persons as trustees, or as *cestuis que trust*, unless the gift is made by deed, indented and enrolled according to the directions of the act, and which directions require the execution and delivery of the deed to be at least twelve months previous to the death of the grantor, and the enrolment within six months after its execution, and all the prohibited dispositions are expressly annulled and declared void. The preceding review of the adjudications on the subject, has shown that the court of chancery, in furtherance of the declared purpose of the statute, have held that bequests of money directed by the will to be paid in by devisees of land, and bequests of money secured by mortgage of real estate, are within the spirit of its prohibition; and following up the policy and spirit of the act, the court has decided that the bequest to charitable uses of the proceeds of land directed by the will to be sold, is invalid and void. In short, every disposition by will of land, or of any term or other interest in land, or of money to arise out of land, or to be invested in real estate, if given for the use of a charity, has been decided to be illegal.

This liberal construction of the act by the English courts, was in accordance with their views of the intention of the legislature ; for the recital of the act declaring the prohibited uses to be a public mischief, it was held that the statute declaring them void was to be regarded as a remedial act, and was therefore to be liberally construed to suppress the mischief, and to advance the remedy. If that statute, therefore, or any correspondent provision, was in force in this country, the devise now under consideration might perhaps be indefensible. But we have no such statute. Devises to charitable uses are not prohibited by our legislature. The decisions of the English courts under the statute of 9 Geo. 2, ch. 36, do not apply therefore to cases arising in this state. We must look to earlier adjudication for the rules that are to govern our courts in the exposition of charitable devises. What then was the law of the English court of chancery prior to the prohibitory act of 9 Geo. 2, relative to devises of land to corporate bodies for charitable uses, or to trustees for the benefit of charities ?

Anterior to that statute, there was no restraint in that country upon the dedication of real estate to the purposes of charity, except the ancient statutes of mortmain, which prohibited the alienation of lands to corporated bodies, and the auxiliary exception in the statute of wills. The statutes of mortmain have not been adopted by this state, but the exception in the statute of wills has been incorporated into our act, and that exception is the only impediment to the alienation of lands by the owners of the inheritance, which is known to our system of laws.

By the statute of this state concerning wills, all persons (other than bodies politic and corporate) are permitted to take lands by devise ; and may take the same to or for any lawful use or purpose whatsoever without restraint. Now, the case before me is that of a devise to the executors of the will, who are natural persons, and capable of taking by devise, subject to the trusts declared by the testator, and by which trusts the estate is to be applied by the Orphan Asylum Society to the charitable purposes for

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which that association was established. Can the exception in the statute of wills, which applies solely to devises to corporate bodies, disable this corporation then from taking the benefit of the trust vested in the trustees for them, as *cestuis que trust* of the property, to be applied by them to the charitable purposes of the institution they represent?

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The English statutes of 32 and 34 Hen. 8, commonly called the statutes of wills, contain the same exception as the act of our legislature. It was continued in force in that country from the time of its passage, in the reign of Hen. 8, to the time of the separation of this country from that. As, therefore, the exception in that statute is incorporated without variation into our own, and as it was for centuries in operation in England, the judicial expositions of its meaning in the courts of that country are to be our guides in expounding it, and if, at the time it was adopted by our legislature, it had received a judicial construction in that country, the courts of this state would, as a general rule, conform to that construction. What then was the construction of this exception at that period of time at Westminster Hall? Was it held to disable a corporate body from taking an interest as *cestui que trust* in lands for charitable purposes? and was its operation to avoid a devise of land to trustees for the benefit of a body corporate, equally with a devise of the land itself directly to the corporation?

Kyd, (1 Kyd, 101,) in his treatise on the law of corporations, states the rule on this point to be, that though bodies politic and corporate are expressly excepted from the statute of wills, and are therefore incapable of taking *directly* by will, yet it has been held that they are not, *by means of that exception*, rendered totally incapable of taking the benefit of a devise made in their favor. He instances the case of a direction by a testator in his will, that executors convey to a corporation, in support of his position; and refers for his authority to Porter's case, (in first Coke's Reports.)

In Porter's case, it is stated in argument, and agreed by the court, that if a man devised that his executors should,

by the advice of learned counsel, convey his lands to any corporation, spiritual or temporal, this was not against the statutes, because it might be lawfully done by license to alienate in mortmain.

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Porter's case, as reported by Lord Coke, (1 Coke's Rep. 22,) arose upon a devise of land by a testator to his wife and her heirs, upon condition that she, upon advice of learned counsel, in all convenient speed after his decease, should assure, give and grant the same for the maintenance and continuance of a free school in his will mentioned, forever; and that the wife should have the issues and profits thereof during her life, bearing the charges of the school as the same was then kept and maintained. It was contended that the condition was against law, being contrary to the statute, (23 Hen. 8, ch. 10,) for the suppression of superstitious uses; but to this it was answered, first, that good and charitable uses were not made void by that statute, but only superstitious uses; and secondly, that admitting that good and charitable uses were made void by the act of 23 Hen. 8, yet the condition was not void; for if the uses were prohibited by the act, yet the testator had devised that counsel should advise how the said tenements should be assured for the maintenance and continuance of the school, and that might be advised lawfully, viz. first to make a corporation of them by the king's letters patent, and afterwards by license to assure the lands and tenements to them. To illustrate and enforce the principle thus advanced, the case cited by Kyd is put as an analogous case and as settled law; and it was insisted by counsel, and agreed by the court, that inasmuch as the condition was not against law, and because it might be lawfully advised and done, (although the use had been prohibited, as it really was not,) the wife was bound to perform it.

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A third point was made by the counsel for the queen, which was, that admitting the use to be prohibited by the act, and that the reference to counsel could not exempt the same from its operation, yet that the statute of wills had taken away the force of the act of 23 Hen. 8; but as to that, says the reporter, the barons did not deliver their opin-

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ions, because they resolved upon the two first points. Here then was a devise of real estate to a devisee, on condition to assure the same to and for the charitable purpose of maintaining and continuing a free school, which had then recently been established, but was a voluntary association, without any charter of incorporation; and yet the object being a charity, the condition was held to be valid in law, and binding upon the devisee, because the benevolent intention and design of the testator might be effectuated by means of an incorporation and license thereafter to be procured. If the principle of this case is sound, it follows that a devise of land to a devisee capable of taking a legal estate for the use and benefit of a charitable institution, which could not take by direct devise to itself, will be supported if the trust may by any means be lawfully vested in the charity, or executed for its benefit.

An incorporation and a license were in that case held necessary, because the trust was to assure the estate to a free school, which must have a charter of incorporation, to enable it to take by grant; and the license was required to remove the impediment of the statutes of mortmain, which prohibited alienation of land to corporate bodies; but neither can be necessary where the trust is to convey to a subsisting corporation, and no statute of mortmain is in force.

This case did not establish the precise proposition, that a devise of land to trustees, for the benefit of an institution, incorporated for charitable purposes, is valid, for that point is not made in the cause; but the point it did decide, appears to me, to involve the same principle. That case settled the principle, that a devise of real estate to trustees capable of taking by devise, for the benefit of an unincorporated association, which could not have taken the estate itself by direct devise to themselves, is effectual to vest the estate in the trustees, and will be available to the beneficial owners, if they can afterwards qualify themselves to take and hold the interest; and if a devise to trustees for the free school, not then possessing, but afterwards to acquire a corporate capacity, and a license to take by grant, was

held to be good, how can a devise to these executors in trust for the subsisting corporation of The Orphan Asylum Society, which has power to take lands by grant, be illegal and void? Can the incapacity of the corporation to take land by devise, disable the institution from taking the estate intended for it by a grant from the trustees? When Porter's case was decided, the statutes of 32 and 34 Hen. 8, were in force, and were noticed in argument, but neither the counsel nor the court advert to the exception in the statute, as hindering or impeding the execution of the trust by the devisee of the estate; but the settled rule of law is stated to be, that a devise to executors upon trust, to convey on advice of counsel to a corporation, is not against any act of parliament, because it may be lawfully done by license; and if there had been no statutes of mortmain to prohibit the alienation of land to a body corporate, a charter of incorporation alone would have been requisite, and the executor would have had no occasion for a license to convey; but the trust would have been valid and obligatory upon them by the force of the will itself.

"So in the case of the Attorney-General v. Downing, (Ambler, 550, 571, 1 Dickens, 414,) the remainder of an estate of inheritance was devised to trustees, who all died in the testator's life time, upon trusts with the rents and profits to establish a college, and after the founding or incorporation of such college or body corporate, the trustees and their heirs, to stand and be seised of the estate in trust for the collegiate body, and their successors forever. The question was, whether this trust should be decreed or not. No notice was taken of the exception in the statute of wills, as invalidating the devise, or excluding the college from the endowment, but the objection was, that the devise was illegal and void, by the statutes against mortmain, and the answer to this objection was, that the trust was executory, and the manner of effectuating the intent with license of the crown, was lawful. It was further insisted, that if the crown should refuse a license, of which there was no probability, the devise would yet be good as a charity, under the statute of 43 Elis., and the court would execute the

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trust *cypres* ; but in neither view of the case does the statute of wills appear to have been regarded as affecting the devise or the execution of trust.

And in the case of *Adlington v. Cann & Andrews*, (3 Ath. 141,) where the testator had made a will before the statute of 9 Geo. 2, devising his real estate in Bristol to trustees, in trust to dispose of the rents and profits of the same, not exceeding £250 for the building of a hospital, to be under a master for instructing in reading, writing, arithmetic and the mariner's art, as many boys as the profits of the estate given by him to the hospital would clothe ; and after the passage of the mortmain law of 9 Geo. 2, had revoked that will, and substituted another in its place, Lord Hardwicke said, that the first will, if the testator had not revoked it, would certainly have stood.

If then, a corporate body, before the statute of 9 Geo. 2, was not, by the statute of wills in England, rendered totally incapable of taking the benefit of a devise, why should our act concerning wills be construed to create an entire incapacity with us ? In England the anterior statutes of mortmain, which have subsisted there in different forms from the time of *magna charta*, made the license of the king necessary to a *valid and effectual conveyance, from the trustees to the corporation. But we have no statute of mortmain, and corporate bodies may, therefore, receive conveyances of land from their trustees without any license or dispensation for that purpose ; or if a license could be necessary, the capacity to take lands to a limited amount in value conferred upon The Orphan Asylum Society, by its act of incorporation, must surely be a sufficient warrant.

Then what rule or principle of law, or statutory provision is there in this country, to prohibit or disable a corporation from taking and holding a beneficial interest in real estate as *cestui que trust* by devise ? The use or trust of land is a distinct interest from the land itself, and collateral to it. It is the right in equity to the pernaney of the profits of lands whereof another person has the legal seisin and possession, and to direct and control the conveyance of the estate, and the defence of the land by the trustee, and that

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right may be transferred by assignment, or transmitted by devise or descent.

Upon these properties of an use, which belong equally to trusts of modern times, a system was, soon after the introduction of the doctrine of uses, established in England for the testamentary disposition of lands; and long before the statute of wills, the general power of devising was thus indirectly acquired. One method was to convey the land to feoffees to the use of the will, and then to declare the uses of the feoffment by the will; the effect of which was to turn the legal estate into a use, and then to devise the use to the object of the testator's bounty; and it was held that the subject of the devise not being land, but an equitable interest subsisting in contract, and collateral to the land, the feudal restraints did not apply, and a corporate body was as capable as natural persons of taking under the devise.

Lord Coke, in his comments on Littleton, (Co. Lit. 272, sec. 462, 463,) and in his Reports, (6 Coke, 18, Sir Edward Clare's case,) observes, that where a man makes a feoffment to the use of his will and by his will limits estates according to the powers reserved to him on the feoffment, the estate shall take effect by force of the feoffment, and the use is directed by the will, so that the will is but declaratory; and Saunders (1 Saunderson's Uses, 72,) noticing the practical operation of this system, observes, that courts of equity in allowing a devise of the use, did in effect permit the legal interest in the land to be devised; and this indirect method of disposing of lands by devise, not only appears to have been in general use, anterior to the statute of 32 Hen. 8, cap. 1, but it was recognised and sanctioned by parliament. For by the statutes of 7 Hen. 7, ch. 3, and 16 Hen. 8, ch. 14, persons in the king's service in the wars were allowed to alien their lands for the performance of their wills, without license or fine for alienation. If, prior to the statute of wills, when all persons were alike incapable of devising or taking by devise, except in particular cases and by special custom, this devise of land, by the indirect method of devising the use of it, was permitted, why may not the same method be still pursued in the case of devises

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to corporations, who continue under the same disability now as before the statute? It is settled that the general power given by statute to devise, does not affect the special custom which antecedently authorised devises in particular cases; and on the same principle the indirect method of devising by means of a use, must continue as it was before; and the method of devising by copy-holders is a practical illustration of the principle; for as the statutes of wills do not extend to copy-hold estates, a power of devising them indirectly by the agency of uses, is at this day in constant exercise, similar to that which was used for the devising of freehold lands before the statute. The copy-holder surrenders his estate to the use of his will, and then disposes of it by his will, which operates as a declaration of the uses of the surrender, and not as a devise under the statute of wills.

It would seem to be clear then, that if the estates vested in the executors in this case had been conveyed to them by the testator in his life time, by feoffment or fine to the use of his will, and he had afterwards declared the uses of the feoffment by his will, the trusts would have been valid and effectual. Why then are not the same trusts valid, when the estate which feeds them is created by devise?

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*It is laid down in the Touchstone, (Shepherd's Touchstone, tit. Devise,) on the authority of Coke, that a man may by act executed in his life time, or by his last will and testament, at his decease, give his lands, tenements or hereditaments, to any person or persons not corporate, and their heirs for any religious, charitable or civil use, as well as for any private use, and that these are not such uses as are executed by the statute of uses; and the rule is general, that any grantor who is capable of an estate directly to himself, is capable of the same estate by way of use; but with this qualification, that if the use be limited to a corporation, there must be a license had; otherwise it will be an alienation in mortmain. The necessity of a license to corporations, to take the use of land vested in trustees for them as *cestuis que use*, was created by the provisions of the statute of 15 Richard 2, ch. 5; and the power to dis-

pense with the statute prohibition, and authorise or legalise the alienation to the corporation by license, was vested in the crown by statute. As the restraints imposed by the statutes of mortmain in England, upon alienations to corporate bodies do not exist with us, no license can be necessary here to secure to a corporation the enjoyment of a trust vested in a trustee for its benefit.

What then is there in our laws to invalidate a trust created by a devise of land to trustees, for the use and benefit of a corporation, if the trustees are persons competent to take land by devise under the statute of wills? It is the beneficial interest and equitable ownership, and not the legal estate that vests in the corporation by the will; and if the use may exist as a distinct interest from the land, there seems to be no reason why corporate bodies, equally with natural persons, where the disability to take land is the only impediment that affects them, should not be capable of taking the use, though disabled to take the land.

Suppose the testator to be himself the *cestui que trust* of the estate, and the legal title to be vested in others upon subsisting trusts for his benefit, and with power to him to dispose of them by will; would his devise of his beneficial interest to a corporate body be invalid; or would not the corporation be entitled to enforce the performance of the trust? Such a devise was, prior to the statute of 9 Geo. 2, effectual under the English law, and until the statute of 15 Rich. 2, ch. 5, which declared that uses should thereafter be subject to the statutes of mortmain, and forfeitable like the lands themselves, would not have come within the operation of the statutes of mortmain, nor have required a license to give it efficacy; and under the modern doctrine of trusts, to which the statute of uses gave rise, the beneficial interest in the land continued to be devisable to corporate bodies, without any other legal restraints than those which the old statutes of mortmain and the act of 9 Geo. 2 interposed.

If then the use is ancient, and the trust of land in modern times, was a devisable interest in England, both before and after the statute of wills was passed, and the ancient

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statutes of mortmain, and the more recent act of 9 Geo. 2, were the only obstacles in that country to a valid devise of them to corporate bodies, on what principle is it that a testator may not in this country, where no mortmain act exists, devise the lands he holds to trustees, subject to a trust for the benefit of a corporation? He effectually separates the use from the land by the will, and at the same time disposes of the legal estate to one, and the beneficial interest to another devisee. How does the operation of the devise differ from the effect of the previous feoffment, to the use of the will, and the subsequent declaration of the uses by the will? The corporation takes the trust or beneficial interest equally in both cases, and takes nothing more in either; must not the same principle then equally govern both? Can it be that a trust which is valid, if fed by an estate created by a previous feoffment, to the use of the will, becomes invalid because it is fed by a legal estate created by the will itself? How is the exception in the statute of wills to produce that effect? That statute created no new disability. It left corporations as it found them. They were under no prohibition by any statute of the state restraining them from taking the beneficial interest in real estate as *cestuis que trust*. The only disability which affected them was, the incapacity to take land by devise. The origin and brief history of that disability, will best show the light in which it is now to be viewed.

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*The restraint of the power of alienation of lands of inheritance, or to speak more correctly, the want of capacity to transfer or receive the freehold, of which that disability is the remnant, was not deduced from the principles of the ancient common law of England; but was, by feudal policy, engrafted upon the system of jurisprudence prevailing in that country at the time of the Conquest. It was an incident to feudal tenures; and as long as the relations between lord and tenant retained the spirit of their original establishment, the alienation of the feud was inconsistent with the obligations of the tenant to his lord. But when the yeomanry of the country began to emancipate themselves from the vassalage of the feudal law, the power of aliena-

tion was gradually assumed, and it was ultimately established by law.

The right of alienation *inter vivos*, was an early acquisition of the tenants of the freehold; but the disability of aliening by devise, was not removed until long after the power of alienation by deed had been fully established, nor until long after the doctrine of uses had been introduced. The disposition of estates by will had indeed been preserved in particular districts, and by special custom, from the times of the Saxons; and we may collect from the recitals and provisions of the ancient acts of parliament, and the language of the early reports, that devises of land had grown into use anterior to the statute of wills; but until the time of the 8th Henry, no trace is discovered of any statute authority for the practice. In that reign the general right, which would seem to be incident to the ownership of the soil in civilized countries, but which had been so long suspended in subserviency to the policy of a military system of tenures as to be almost forgotten as a right, was revived and restored. One exception was however made in the English statutes of wills, in deference to the statutes of mortmain; not because a devise to a corporation was contrary to the principles of the ancient common law, but from an apprehension that a statutory provision, giving a general unqualified power to devise might be construed to authorise the devise of land to corporations in mortmain. In England, that exception had its use as an auxiliary measure in the system of mortmain, which prevailed in that country. The legislature, by excepting bodies politic and corporate from the capacity of taking by devise, which was conferred on all natural persons in their private capacity, effectually guarded the statutes of mortmain from evasion, by the operation of the new power of disposition by devise; for a corporation could not take under a devise directly to itself, for want of capacity, and a devise to a trustee for its use would be within the prohibitions of the statutes of mortmain. The exception was continued in our act concerning wills, but with us is an insulated provision, merely leaving corporations under the same disability after the passage of the

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act as they were under before, and as I apprehend, without producing any other effect upon them; and whatever may be the reason for continuing it in the statute, I am not prepared to say that either the terms of the exception, or its policy and utility, under the laws or institutions of this country, are such as to justify this court in applying it to a devise to competent trustees for charitable purposes, merely because a corporate body is to administer the charity.

The right to purchase and hold real estate is incident to every corporation, and the corporators are entitled to acquire lands by every means permitted by law; and conceding that the disability which was engrafted by feudal policy into the common law, was transplanted with it into the free soil of these states, and that it continued in full force at the time of the passage of our statute of wills in 1786, it still was no more than a disability to take lands in the particular mode prescribed by that act; and it would be against an elementary principle to extend a disability or a restraint, if it can be so considered, which is in derogation of one of the rights of property, and a common incident to a corporate capacity, beyond the letter of the law or the necessary construction of its provisions. The act, it is true, does not enable corporate bodies to take lands by devise, but it does not prohibit them from taking the use or trust of lands as *cestuis que trust*, nor does it restrain those whom it enables to take by devise, from taking or holding for the use or benefit of corporations, or from subsequently conveying to them. The direct devise of land to the corporation is inoperative, not because it is prohibited by law, but because the corporation, from the continuance of a positive rule of feudal policy, once imperative, as an incident to the tenure of the land, but the reason of which has long since ceased, is without the capacity to take. But that incapacity does not preclude another who has capacity, from taking for their benefit, nor does it disable the corporation from acquiring indirectly by a devise to a trustee, and a conveyance from that trustee to the corporation, what the want of capacity to take by devise disables them from taking directly by

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the will itself. Nor is this devise of the trust of land to the corporation, instead of the land itself, to be regarded in the odious light of a fraudulent evasion of the act concerning wills. The rule that a party shall not do indirectly what the law does not permit him to do directly, does not apply ; for that rule was made for cases where the act is prohibited by statute, or is in itself illegal or morally wrong, and where the circuitry is a device to evade an express provision or rule of law. It has no application to the case of mere incapacity, when the indirect means employed to obviate the impediment contravene no statute regulation, nor violate any principle of law. The transfer by a married woman of her estate to her husband, is an example to illustrate the distinction ; for the coverture disabled her from conveying, and him from taking the estate, by a direct conveyance from her to him ; but yet, by the joint deed of the husband and wife to a third person, and the grant of that third person to the husband, a valid and effectual transfer of the estate from her to him will be effected. So the wife is incapable of acquiring personal property for her separate use, by a direct transfer of it to herself, for *eo instanti*, that it is conveyed to her, the marital right vests it absolutely in him ; yet a settlement of it upon her, by vesting it in trustees for her separate use, may effectually secure it for her benefit, and against his dominion or control. So, too, a tenant in tail was restrained by the statute *de donis* from aliening the entailed estate, by a direct conveyance to a purchaser, and yet the law allowed him to effect the object by the indirect and circuitous means of a common recovery.

*Is the legal incapacity of a corporate body to take by devise, or of a testator to devise real estate to corporate bodies, more absolute than that of a feme covert, to convey to her husband, or to acquire personalty for herself ? Besides, we have seen that anciently, when the disability to take by devise was general, the agency of uses was employed in the indirect disposition of the beneficial interest in lands to corporate bodies by will, and the continuance by the exception in the statute of wills, of the pre-existing disability of devising lands to bodies corporate, and of corpo-

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rations to take by devise, does not disable the testator from exercising the same power by means of trusts, which he before exercised by the agency of uses in obviating the disability, any more than the omission of the statute to authorize the devise of land by copy-holders, took from them the right they possessed before, of disposing of the copy-hold estates by will through the instrumentality of a surrender. If in this state, as in England, public policy shall ever require the exercise of the owner's dominion over his property to be further abridged, and devises of interests in real estate to charitable uses shall be suppressed or prohibited by the legislature, this court will be as ready to enforce the provisions of the prohibitory act, as the English court of chancery was to carry into effect the mortmain law of Geo. 2; for when the charitable use shall be declared unlawful and void, any mode of creating it will be illegal. But as yet, the power to devise to the purposes of charity continues to be unrestrained; reliance is placed on the intelligence and discretion of the citizen for security against the abuse of the power he possesses over his estate; and a further precaution and safeguard against the undue amortising of land by corporate bodies, is found in the policy of the legislature in limiting the amount in value of the land the corporation is entitled to hold, by the act of incorporation, or by general laws. On what ground, then, is this court to hold devises of land to trustees for the benefit of corporate bodies, to be unlawful or invalid, or adjudge them fraudulent and void, as evasions of the exception in the statute of wills? I cannot surely deny to an incorporated institution for charitable purposes, the right to the bounty of a testator, who, in his endowment of the charity, has had recourse to the intervention of trustees to obviate the consequences of the disability of the institution which has the administration of the charity, to take lands by devise; and I must therefore hold the trust vested in these executors by the will for the complainants in this case, to be valid.

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But it is contended that the trust, if valid, was executed by the statute of uses, and that the legal estate which by that operation would have passed to the complainants, if

they had been capable of taking it, became, by their disability to take, wholly inoperative and void. The reasons I have already given in favor of the validity of the devise to the executors under the will, inclines me to the opinion that the devise is a subsisting trust, and has not been executed by the statute. The trust of the estate is, that it shall be applied by the Orphan Asylum Society for the charitable purposes for which that association was established. It is to the charity that the testator has devoted his bounty, and the corporation is merely the almoner to dispense it. The complainants are *cestuis que trust*, not for general purposes, and to deal with the estate as their own, but for the purposes of the charity alone. It is in the nature of a public charity, and not a mere private use or trust, which it was the policy and intention of the statute to execute. It is a devise to competent trustees for charitable uses, to be administered by the complainants; and do not such uses partake too much of the character of modern trusts, to be executed by the statute of uses?

It is admitted that the trusts of the will subsisted, and were vested in the executors at the death of the testator's child. If the child had lived to the age of twenty-one years, or had married, and the estate had been sold by the executors in pursuance of the trust, the complainants would have been entitled to a moiety of the money arising from the sale; and as they have become by the death of the child entitled to the benefit of the whole of the trust estates, if the trust to sell continues to subsist, they would now be entitled, in case of a sale, to the whole of the proceeds. But if this trust or power to sell was extinguished by the death of the child, which however I am not to be understood as admitting to be the case, still the complainants as the *cestuis que trust* of the estate, are entitled to the rents and profits for the benefit of the charity, and the trustees are bound to convey the trust estate as they may direct. Then, is this a trust within the statute of uses? An express trust to convey, would indisputably have given the interest of the complainants the character of an equitable estate; but the trustee is bound by the obligations of

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the trust, without any express direction, to convey as the *cestui que trust* shall direct. Can it be then, that the estate of the *cestui que trust* is to be legal or equitable, according as the duty of the trustee to convey is expressly enjoined by the will, or results from the trust; or must not that question turn upon the character and purposes of the trust and the intention of the testator? The intention of the testator obviously was to endow the charity, but to vest the legal title to the real estate intended for that purpose in the trustees. That such was his intention is manifest, not only from the appointment of trustees, but from the distinction he has made between his real and personal estate; for though he dedicates both to the purposes of the charity, yet he vests the real estate alone in trustees bequeathing the personal directly to the complainants themselves. Could there be a stronger proof of a special intent? And when the general and special intention of the testator concur, and the rules of law do not hinder, such intention ought surely to govern the construction of the will.

If, therefore, the complainants were disqualified from taking the estate from the trustees, by the operation of the statute of uses, that statute could not execute the use; and the trust must remain in the trustees to the uses of the will, or the intention of the testator must be frustrated; and if the legal estate might be legally and securely transferred to the complainants, yet, under the circumstances of the case, and upon the intention of the testator, and as the estate was vested by the will in the trustees for the complainants, to be applied to the purposes of the charity, and not for private uses, and as the complainants might be advised or might desire to take the conveyance of it under the direction of the court, and upon special trusts for the application of it to the purposes of the charity as directed by the will, I think I conform to the principles of equity, and impugn no rule of law, by holding the devise to create an equitable interest and not a legal estate.

But supposing the statute of uses to execute the trust, and the legal estate, on the death of the child, to vest by

the operation of that statute in the corporation as *cestui que trust*, to whom the use was devise ; does it follow that the rights of the society were lost by the operation ? It is conceded that the legal estate vested in the executors on the death of the testator, subject to the uses of the will, and continued so vested in them until the death of the child. Then, if that estate was by that event transferred to the *cestui que use*, it was so transferred, not by the will, but by the operation of the statute of uses ; and the corporation took not as devisees, by virtue of the devise, but as *cestuis que trust*, by operation of law. The testator gave the legal estate to the executors, and devised the use of the whole, or a moiety of it, on certain contingencies, to the corporation ; the statute of uses did not avoid that devise, nor prevent its taking effect ; but permitted the estate to vest, and then executed the use. The statute of wills was merely passive ; it conferred no capacity in the corporation to take, which was not possessed before, but it created no restraint, disability or interdiction to the right of acquisition of property which a corporate body was not subject to before ; and if the corporation may take by deed from the trustees, they may surely take by virtue of the statute of uses, which operates as a statute conveyance, transferring the possession to the use ; and this, the legislature, in the statute itself, would seem to concede ; for they enact that when any person then stood, or was seized, or thereafter should stand or be seized of lands to the use, confidence or trust of any other person or any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, such person or body politic that should have any such use, &c. should from thenceforth stand and be seized of the lands of the like estates as they had in the use : a provision which, in terms, admits that real estate may be devised to a person to the use of * or in trust for a body corporate ; or, in the words of the statute, that a man may stand or be seized of an estate of inheritance to the use, trust or confidence of a body politic, by reason of a will, and that the body politic that has such use, confidence or trust, shall stand

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and be seised of the land of and in the like estates as they had in the use. To apply that principle to the present case; the testator having devised his estate to his executors, in trust for the Orphan Asylum Society, the executors were, by reason of the will, seised of the estate to the use of the society, and by force of the statute, the corporation that had the use, became seised of the land of the like estate as it had in the use; and can an estate thus transferred to the corporation and vested in it by law, be invalid or void?

The legal operation of the statute is to displace and destroy the intermediate or trust estate of the trustee, and convert the interest of the *cestui que use* into a legal ownership of the land. This principle has been long settled and is well established; it is the principle upon which the modern system of conveyancing is founded. In England the restraints of the statutes of mortmain, and of 9 Geo. 2, render it in a great degree unavailable to corporations; but in this country, those restraints do not exist, and there would seem to be no legal impediment to the transfer of the possession by the statute of uses to a corporate body to whom the use may be appointed by the will.

If then the legal estate was devised by the will in question, to the executors in fee, for the use, in the event that has happened, of the complainants, for the purpose of their charitable establishment, and if the operation of the statute of uses upon it, was to transfer the legal estate of the trustees to the *cestui que trust*; and if that statute does apply to this case, the complainants, notwithstanding their incapacity to take by devise, must, on the principles I have deduced from the statutes and the adjudications, take the legal title thus cast upon them by law, and be entitled to hold it. It is a well established rule, that the statute cannot execute the use, unless there is a lawful *cestui que use in esse*, capable of taking the land, to whom the possession may be lawfully transferred, and who is to become vested with the same estate in possession as he had in the use. The terms of the statute on this point, are clear and explicit: that upon the execution of every

use, the *cestui que use* shall have the legal estate after such quality, manner, form and condition as he had before, in or to the use, confidence or trust that was in him; and it would seem to follow, that in the present case, the complainants must become vested with a valid and effectual estate in possession in the land, for the purposes of the charity, or there could be no execution of the trust by the statute.

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In either view of the subject, therefore, whether the trust originally vested in executors by the will, remains in them as trustees, or has been transferred to the society as *cestuis que trust*, the title of the complainants as trustees at law, or as *cestuis que trust* in equity, to the estate for the use of the charity to which it is devoted by the testator, would seem to be valid.

But suppose the devise for the use and benefit of the complainants to be void in law, as being in effect a devise of land to a corporate body, or as enuring to the benefit of a corporation, the question would then be, whether the testator's intention may not be effectuated in a court of equity.

It is conceded that the court of chancery has had the acknowledged jurisdiction of uses and trusts, ever since the first introduction of them from the civil law into the English system of jurisprudence; and as charitable uses are a branch of the same system, the cognizance would seem naturally to belong to the same jurisdiction; and whatever difference of opinion may exist, as to the jurisdiction exercised by the English court of chancery, in times of high antiquity, it must be admitted, that it has long been the course of that court, to take cognizance of trusts for charitable purposes. [1] It is the established doctrine of the court at the present day, that (with the exception of the charities prohibited by the mortmain act of George the Second,) when the donor has the power to dispose of the estate he devotes to charity, the court will aid a defective conveyance to charitable uses; and, on this principle, de- [*470]

[1] *Vidal v. Girard's ex'rs*, 2 How. 127. *Dutch Church in Gardin st. v. Mott*, 7 Page, 77. *Kinskern v. Lutheran churches of St. John and St. Peters*, 1 Sanf. Ch. 440. *Spotwell ex'rs &c. v. Mott*, 2 id. 46. *Whiteman v. Lox*, 17 Serg't & R. 88.

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vises to bodies corporate, which are void at law for want of capacity to take, were antecedently to the act of Geo. 2, held to be, notwithstanding the old statute of mortmain, good in equity, if given to charitable uses.

But the jurisdiction of the English court of chancery, in cases of charitable uses, is ascribed to the statute of 43 Eliz. ch. 4, usually termed the statute of charitable uses; and it is said that devises to corporations, and to trustees for their benefit, where the devise was for a charitable use, owed their exemption from the operation of the ancient statutes of mortmain, and the exception in the statute of will to the enabling statute of Elizabeth.

The statute of Elizabeth was confessedly a remedial law; and it introduced a system for the redress of grievances by the abuses and frauds of trustees to charitable uses, which was at once simple, summary and efficacious.[1] But it was not the purpose or design of that statute to create the charitable uses to which its provisions were to apply; nor does it profess to authorize or establish any charity that did not exist before, or to provide the first and only remedy known to the laws, for the vindication of the rights of donees to charitable uses. On the contrary, it recognises the charities it enumerates as antecedent and subsisting interests, and its purpose is to provide a speedy and more efficient remedy than that then existing for the abuses to which those interests were exposed. That such was the character and design of the law, is shown by the act itself; it refers in its recital to a long list of charities, to which lands and goods had theretofore been dedicated by the queen and her progenitors, and sundry well disposed persons, and which donations had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trust and negligence in those to whom the employment was entrusted; and for redress and remedy of the grievances, it authorises and directs a summary enquiry into the matter, by commissioners and a jury, under the supervision of the court of chancery; and the establishment and due application to the "purposes of

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[1] See Attorney General v. Mayor of Dublin, 1 Bligh, 347, 2 Kent, † 287.

the dedication of all such estates, and of all estates and premises thereafter to be given, limited, appointed or assigned to or for any such charitable uses.

Charities then were in general use before the statutes of Elizabeth; [1] and were regarded by parliament as meritorious, and worthy of the peculiar care and patronage of the legislature. They were exposed to abuses, and embarrassed with difficulties, by the infidelity of the agents entrusted with the estates conferred upon them by the benevolent donors who had founded or endowed them; and they stood in need of legislative aid for their further security and protection. The existing remedies, as they were then applied, must have been found to be inadequate to the protection of those widely extended charities in the full enjoyment of their rights, or the legislature would not have interposed.

But it cannot be supposed that those rights, in themselves so important and interesting, as they obviously were, to the whole community, should have been suffered by the queen and her progenitors, to languish so long under the grievances recited in the statute, without any remedy for the redress of the wrong. It could not have been tolerated, that trustees of charities should betray their trusts, and abuse, neglect or misapply the estates committed to their charge, at pleasure and with impunity. There must have been some jurisdiction to take cognizance of the complaints of the *cestuis que trust* of charities, who were aggrieved by the frauds or negligence of the trustees; and that jurisdiction must have belonged to the court of chancery, where trusts have always been cognizable, either in the exercise of its ordinary jurisdiction, or in the administration of the prerogative of the crown, as *parens patriæ*. In the time of Queen Elizabeth, when the principles of equity jurisdiction were imperfectly understood, the limited ideas of redress which were entertained by the courts of equity, may have induced them to refrain from the exercise of powers which they legitimately possessed; and it may well be, that in

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[1] Lord Eldon in *Attorney-General v. The Skinners Co.*, 2 Russ. 407, 420. Sir. John Leach in *Attorney-General v. The Master of Brentwood School*, Mylne & K. 100.

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those early times, frauds, abuses, and misapplications of trusts to charitable uses, which *would now be subject to equitable cognizance, were then supposed to be remediless by the ordinary powers of courts of equity, and to require the interposition of the legislature to repress them.

It was not until the time of Sir Heneage Finch, afterwards *Ld. Nottingham*, who succeeded to the seals in 1673, that the principles and powers of the court were fully developed and matured. "His genius," in the language of Sir William Blackstone, the learned commentator on the laws of England, "enabled him to discern and pursue the true spirit of justice," and "to build a system of jurisprudence and jurisdiction upon wide and rational foundations, which have also been extended and improved by many great men who have since presided in chancery." (3 *Black. Com.* 56.) In the time of *Ld. Ellesmere*, who presided in the court of chancery very shortly after the statute of Elizabeth concerning charitable uses went into operation, the great and salutary principles, that a trust fastens itself upon the land, and binds the heir or devisee upon whom the legal title may devolve, and that the court has the power to supply the failure or defect of trustees for the establishment of the trust, had been but partially called into exercise, and were too illy understood for any beneficial results or useful rules to be deduced from them for practical purposes; and we find that in *Collinson's case*, where the devise was to trustees before the statute of wills, and in *Doctor Floyd's case*, where the devise was to a corporation and the devises being void in law, the lands descended to the heir clothed with the trust, the court of chancery to which the jurisdiction of trusts belonged, took no cognizance of the cases; but the heirs were suffered to misemploy the estates, though devoted to charitable uses, with impunity, until the statute of Elizabeth provided an efficacious remedy for the abuse, by enabling the commissioners to decree the performance of the trusts.

The occurrence of such cases, with the failure of trusts from other causes, (some of which may have been beyond the powers of a court of equity, if called fully into exercise

"to obviate or remove,) may have given rise to the tradition mentioned by Lord Loughborough, in the case of the Attorney-General *v.* Bowyer, (3 Vesey, 714,) and may have led that chancellor to the opinion he seems to have formed, "that the court, at the period to which he referred, (being a time prior to the statute of wills,) had no cognizance upon informations for the establishment of charities; and that prior to the time of Lord Ellesmere, there was no such information in the court in which he was then sitting; but they made out the case as well as they could by law." But the tradition upon which Lord Loughborough founds his opinion, cannot have transmitted the ancient course of the English court of chancery with fidelity; and is not to be implicitly trusted. We have the testimony of some of the most intelligent and best informed jurists and equity judges of that country, that the court, from times of very high antiquity, and long before the statute of Elizabeth, had cognizance of informations by the attorney-general for the establishment of charities, and that the equity powers of the court were applied, though not so beneficially and extensively as in after times, to cases of charitable uses.

Thus in the case of *Eyre v. The Countess of Shaftsbury*. (2 Peer Wms. 103,) Sir Joseph Jekyll the master of the rolls, sitting as a commissioner, held, that in case of a charity, the king *pro bono publico*, has an original jurisdiction to superintend the care thereof; so that abstracted from the statute of Elizabeth, relating to charities, and antecedent to it as well as since, it has been every day's practice to file informations in chancery in the attorney-general's name, for the establishment of charities.

So in *Lord Falkland v. Bertie*, (2 Vernon, 333,) Lord Somers takes notice that several things are under the care and superintendence of the king as *parens patriæ*, and he mentions charities, infants and lunatics; thus classing these cases as belonging all to the same jurisdiction.

And in the case of *Christ's College, Cambridge*, (1 Wm. Bl. 90,) Henley, keeper, afterwards Lord Chancellor Northington, is decisive and strong in his opinion on the point; "I take the uniform rule of this court, before, at and after

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the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses ;" and he illustrates his meaning by the very example of a devise to a body corporate to charitable uses : thus, he observes, " though devises to corporations were void under the statutes of Hen. 8, yet they were always considered as good in equity, if given to charitable uses." This case is more fully reported in Eden, who was a descendant of Lord Northington, and had the benefit of his notes. There can be no doubt that the opinion attributed to him in these reports was the expression of his deliberate judgment ; and his high character as an equity jurist, gives a sanction of no ordinary import to the doctrine, that the court of chancery had a jurisdiction anterior to the statutes of Eliz. in the cases of devises to charitable uses ; and when we consider that he was opposed to the tide of liberality of courts to charities, and took the lead in that opposition, the weight of his authority is still greater.

But it is said that these are to be regarded as the *dicta* of chancellors not entitled to the consideration of judicial decisions ; and it is added, that no adjudication can be produced between the statute of wills and the statute of charities, in support of the jurisdiction. The interval between the statutes of 34 Hen. 8, and the 43 Eliz. was so short, and the reports of cases in equity at that period so limited in number, that it would be rather a matter of surprise that any adjudication should be found, than that the cases are so few. But there are some adjudications during that interval of time, which appear to me to have a bearing on the point.

In the case of *Weleden v. Elkinton*, (Plowden, 523,) decided 20 Eliz., a case was put of a devise to a church, which was held to vest in the parson. And in *Duke on Charitable Uses*, several cases are found which occurred before the statute of Eliz. where devises for charitable purposes, which courts of law could not sustain, were supported by the court of chancery. In one case, a devise of land to be let out to young tradesmen, was decreed in the

40th year of Queen Eliz.; and still earlier, in the 24th year of the same reign, the want of an enrolment was supplied by the ordinary powers of the court in favor of a charity. And the author collects and arranges under a distinct head of his work, a class of cases as not falling within the statute, in which examples are given of defective devises to charities, which, it is said, do not require the aid of the statute, but may be cured by the court. To this work is added the readings of Sir Francis Moore on the statute of Eliz. printed from his own original manuscript. Sir Francis Moore was a member of the parliament by which that statute was passed, and is said to have penned it himself. His readings upon it come down to us, therefore, with peculiar claims to our attention and respect. In these readings, instances are given of gifts and bequests to charitable purposes, which are not within the statute, but which the court of chancery has jurisdiction to decree. Thus a bequest of £300 to three parishes equally, to be let out by the church-wardens of each, is instanced as a legacy not within the statute, but to which the chancellor may give remedy by his equity powers in chancery; and the case (Duke, 154,) of a gift made in the 11th year of Hen. 6, to the intent to find a chaplain until the feoffor or his heirs should procure a foundation, &c. was said to be neither within the letter nor the spirit of the statute, and yet the chancellor, by his chancery powers, might, and he did decree the land to the use. In that case, the commissioners had acted under the supposition that they had jurisdiction of it; but the decree was reversed by the chancellor, because the use limited to find a chaplain *ad divina celebranda*, was no use within the statute inquirable; but the chancellor, by his chancery authority, might and did decree the land to the first use. These cases were decided antecedently to the statute of charitable uses, and the decisions must therefore have been founded on the general equity powers of the court.

But the statute of Eliz. introduced a new system for the administration of charities. It was calculated and intended for a general system, and embraced all charitable

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devises, whether to corporations or to natural persons, and however indefinite and uncertain the designation or description of the objects or purposes of the charity might be. The enumeration of the charities it was to relieve was so comprehensive, and the relief and protection it afforded them were so ample, that when that statute went into operation, it would in a great degree supersede the provisions and remedies that preceded it. When, therefore, the court of chancery afterwards decreed upon principles peculiar to charities, that court would naturally refer to the statute of Elizabeth, and not to the general powers of the court, or to the civil law for its authority; because the statute, to the extent of its provisions, superseded all other laws, and formed the general system for the administration of charities.

Whether the statute conferred any new jurisdiction on the court of chancery, or did no more than bring into activity the powers which as a court of equity it possessed, but which had therefore been inactive; whether there were charitable uses which did not attach to the land, but derived their validity as trusts from the act; or whether the intention and effect of the act was to give a summary, simple and efficacious remedy for the abuses of subsisting trusts, which, from the forms of proceeding and the imperfect ideas of redress then prevailing in the courts of equity, could not be applied by the court of chancery; are points upon which the counsel disagree, and which may be involved in some obscurity and doubt.

I do not, however, deem it material to ascertain with accuracy the powers which were acknowledged to belong to the English court of chancery, or were in the habitual exercise of that court, at the time of the passage of the statute of charitable uses. It will be sufficient for the decision of this cause, to show that the charity which now engages the attention of the court, though enumerated in the statute of charitable uses, had not its origin in that statute, but existed antecedently to it, and that a devise of land to trustees, for the benefit of that charity, notwithstanding that the Orphan Asylum Society, under whose

auspices the charity is to be dispensed, is a corporate body, and may be incapable of taking land by devise, is valid in equity, and may be supported by the ordinary powers of the court, as the same are now understood and are in constant exercise:

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It must be conceded that charities did exist before the statute of Elizabeth. Some of the uses enumerated in that statute, may not perhaps be strictly charities in their own nature, and it is possible that they may have been introduced by that statute into the system. But the greater probability is, that they had already acquired the character of charities, and were considered as entitled to the same favor and protection as other charitable uses; but however that may be, it will not be denied that the use which the complainants seek to establish, is a charity in its own nature. It would be a reproach to the Christian character, to say that such a charity had its origin at so late a period as the reign of Queen Elizabeth, or that there ever was a time when the spirit of charity was a stranger in a Christian land. But the statute itself disclaims the intention of being the parent of the charities it protects; its recital recognises them as of long standing, and of general prevalence in the community; the declared purpose of the legislature is to rescue them from the difficulties and embarrassments in which the abuses, misapplications and frauds of those intrusted with their dispensation, had involved them, and to raise them from the depression to which they were reduced, and establish them upon secure and solid foundations, and all the provisions of the act conduce to that benevolent purpose.

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This concession in the fact of the previous existence of charitable uses, is fully confirmed by the history of the times and by the reports of the early adjudications under the statute; and the cases cited on the argument show that such was the fact. In Doctor Floyd's case, reported in Hobart, (Hob. 136,) by the name of Griffith Flood's case, the devise was in 1571, 25 Eliz., eighteen years before the statute of charitable devises was passed; and in Collinson's case, the will was executed in the 15th year of

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the reign of Hen. 8, upwards of fifteen years before the statute of wills was made, yet in both these cases, limitations to charitable uses were supported against the title and opposing claim of the heir at law. In Floyd's case, the testator being seised in fee of land in the county of Cardigan, devised the same to his wife for life, and after her death to his daughter for her life, and after those lives ended, to the principal fellows and scholars of Jesus College in Oxford, and their successors, to find a scholar of his blood, from time to time, and died. After the death of the devisees for life, Bridget Floyd, the testator's heir, (being the king's ward,) entered, and upon a case made, Hobart and the chief baron to whom it was referred by the court of wards, agreed that the devise was void in law, because the statute of wills did not allow devises of land to corporations; but they held it clearly within the relief of the statute of charitable uses, under the words "limited and appointed," and so it was decreed that the college should enjoy the estate against the heir. So in Collinson's case, the testator being seised in fee of a tenement not devisable by custom, nor estated to any in use, devised the same to his wife for life, and after her decease, to trustees, to see the same kept in repair, and to bestow the residue of the profits upon the reparation of certain highways in the will mentioned. The testator and his wife being both deceased, and the tenement descending to one Oliver Rolf, an infant, the commissioners under the statute of charitable uses, on the 13th of July, in the 13 James 1, made a decree for the employment of the land upon the repair of the highways; from which decree there was an appeal, and the question was, whether, as this will was made before the statute of 32 Henry 8, and the *land was not in use*, it should be held to be a limitation, appointment or assignment, within the 43 Elizabeth, to warrant the decree. The question was referred by the court to the two chief justices, who certified that the intended devise, though it was void at law, was a limitation or appointment to a charitable use, and relievable under the statute, and the chancellor therefore confirmed the commissioners' decree.

Now, upon what principle were these two cases decided? Assuredly, upon the principle that the limitations of these estates, though they were void in law for the want of capacity in the corporation, after the statute of wills, and of the trustees before it, to take lands by devise, yet being limitations to charitable uses, by the owners of the estates having power to dispose of them, they were good subsisting limitations, and prevented the descent of the estates to the heirs at law; for unless the limitation to the charitable use did subsist, and was an operative disposition of the estate, the beneficial interest, as well as the legal title, must have descended to the heir at law, and have vested in him; and if the interest had once vested, it could not have been afterwards divested, or the use revived for the benefit of the charity, either by the operation of the statute, or by the prerogative of the crown, as *parens patriæ*. It follows that the charitable use attached itself to the land; and that the legal title descended to the heir, clothed with the trust; and it was consequently a misemployment in him to retain the profits to his own use; and the commissioners under the statute of charitable uses rightfully reformed the abuse. On the same principle, the charitable use for the free school in Porter's case, was held to subsist and be obligatory upon the devisee; and though a release to the king was obtained from the heir, yet the plaintiff succeeded upon the validity of the trust for the charity, and not upon the right of the heir.

The same principle must have pervaded and governed every case of a charitable use, anterior to the statute of Elizabeth, where the use was held to be valid in equity, when the devise or deed was void at law, from the failure or incapacity of the donee to take, or the want of sufficient certainty in the description of the persons or designation of the objects or purposes of the charity; and indeed it is manifest from other provisions of the statute itself, that the charitable uses which the commissioners were authorised to establish, were understood to be subsisting uses at the time: for the titles of purchasers of the estates affected by them, who had purchased or obtained the same for valuable

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consideration, and without notice of the trust or charge, were not to be impeached by the decrees or orders of the commissioners; but the commissioners were nevertheless to direct recompense to be made by those who, being constituted trustees, or having notice of the charitable use, had violated the trust, or defrauded the use, by the sale or other disposition of the estate; provisions wholly inconsistent with the supposition of a right in the heir at law, but well adapted at the same time, to the protection of *bona fide* purchasers, and to the relief of *cestuis que trust*, whose interests were betrayed by faithless trustees, or usurped by disappointed heirs.

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*But the hypothesis that the statute of charitable uses was intended or could be made to retrospect, so as to resuscitate or revive an interest in the land which had become extinct, and divest the heir of an estate which had vested in him by descent, is in direct hostility with the clearest and best established principles of law. It cannot be that an estate which had become absolutely and beneficially vested in the heir, could be divested and transferred by the operation of the statute of Elizabeth, or any of the provisions it contains, to the trustees of a charity. The intention of the legislature was to restore to their proper destination the estates which had been devoted to charity, but were improperly diverted to other uses. It did not intend to unsettle private rights, or to disturb vested interests; and acting up to this principle, the courts, in the earliest exposition of the statute, held, that if a person who has not capacity to dispose of an estate as a feme covert, or an infant, for example, devises or grants to a charitable use, the defect is not supplied by the statute; but devises to corporations for charitable uses, subsequent to the statute of wills, and both before and after the statute of Elizabeth, though void in law, for want of capacity in the corporation to take, were held good as uses, which bound the lands in the hands of the heirs to whom it descended, and which therefore might be established and enforced without prejudice to any beneficial interests in the depository of the legal title. The case of Jesus College, already cited, is an example of such

a devise, and in Hallum's case, (Duke on Ch. Uses. 80, 375,) where there was a devise of land to the company of Leather sellers in London, to maintain a charitable use, the exception was taken that the company was a corporation, and that the statute of wills did except devises of land to a corporation; but the commissioners' decree to settle the land upon the company was confirmed by the court, and it is said that there were many precedents for it. These adjudications, in connection with the language and provisions of the statute itself, appear to me to show, that devises of real estate to corporations for charitable uses, anterior to the statute of 43 Eliz. ch. 4, though void in law, by reason of the disability of the corporation to take land by devise, were nevertheless *valid as uses and subsisting charges upon the estate against the heir or devisee upon whom the legal estate might devolve; and if a direct devise to a corporate body itself, when it is for a charitable use, is effectual in equity to charge the land with the trust, the validity of a devise to trustees for the use of a corporation for charitable purposes, cannot surely be invalid, and the devise therefore of the testator in the case now before me, to the executors of his will, in trust for The Orphan Asylum Society, for the charitable purposes of the institution, even if invalid or void at law by reason of the disability of the society as a corporate body, to take lands by devise under our statute of wills, must be held good in equity; and may be supported as a charitable use attached to the land, and binding upon those who are vested with the fee. The question then will be, whether this court has jurisdiction to establish and enforce the use; and in determining that point, the general jurisdiction of the court, and the powers which the chancellor is rightfully authorised to exercise, are to be consulted, for this state has no statutory provisions in force corresponding to those of the English statute of charitable uses; and the relief I give must be upon the general jurisdiction of the court.

It is admitted that there did exist a general jurisdiction over charities in England anterior to the statute of Elizabeth, which was exercised by the chancellor; but that juris-

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diction, it is said, was a branch of the prerogative of the crown, and did not belong to the ordinary powers of the court of chancery. And elementary writers of acknowledged authority are cited, to show that the superintendence of charities, in common with the charge of infants and lunatics, belongs to the king as *parens patriæ*; and that the jurisdiction of chancery in those cases does not appertain to it as a court of equity, but as administering the prerogative and duties of the crown. If this were so, the court of chancery in this state might perhaps claim the jurisdiction for the very reason that in England it did belong to the crown as *parens patriæ*. Charities are classed with infants, as belonging to the same jurisdiction; and as the entire cognizance of the cases of infants, though nominally in the crown, has long been delegated to the chancellor by whom it is exercised, and the chancellor, as administering the same prerogative of the crown, has also the general superintendence of all the charitable uses in the kingdom, it would seem to follow that as the general jurisdiction of the cases of infants in this state is vested exclusively in this court, charities, if they belong to the same jurisdiction, should also be of equitable cognizance; and if so, all the remedy which the English court of chancery, by its ordinary powers, or as administering the prerogative and duties of the crown, could apply, may be administered by this court; and the only question would be, whether the mode of administering the relief must be by information by the attorney-general, or may be by the original bill of a party aggrieved. Anciently the course in most cases probably was to proceed by information in the name of the attorney-general; but that rule has been modified, and in many cases the party aggrieved is now permitted to sue in his own name, and the information has been superseded by the original bill. In the case of *Morrill v. Lawson*, (4 Viner, 500,) decided in 5 Geo. First, Lord Chancellor Parker stated the rule to be, that when a bill is brought to establish a charity given by a will to persons uncertain and incapable of suing or being sued, the suit must be in the name of the attorney-general *ex-necessitate rei*, because there are no certain per-

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sons entitled to it who can sue in their own names. And the inference is, that where the *cestuis que trust* are ascertained and certain, those *cestuis que trust* may sustain an original bill in their own names, to establish and enforce the charity; and that the agency of the attorney-general, or the use of his name as plaintiff in a bill or information, is never indispensably requisite, unless in behalf of a charity in cases where no other person is capable of suing.

But whatever may be the use or necessity of an information by a party in the name of the attorney-general, where the objects of the bounty are so circumstanced as to make it impracticable or inconvenient to sue in their own names, I am not prepared to say that it would in any case be incompetent to *cestuis que trust* of a charity to sustain a bill, or that the form of an information by the attorney-general must be used, merely because the jurisdiction of the court over the charity to be established and enforced may, in its origin, have belonged to the prerogative of the king as *parens patriæ*. The theory of that branch of the English system of jurisprudence may be, that the administration of charitable uses belongs to that jurisdiction; but the power has, from a very remote period, been constantly exercised by the chancellor in the court of chancery, and practically has become, I apprehend, as much a branch of his jurisdiction as the care and charge of infants; and perhaps as much so as the administration of other trusts to which the equity powers of the court are applied. The uniform course of the court of chancery in England, in its administration of charities, has been to proceed by bill in all cases of trusts for charitable purposes in common with other trusts, whenever the parties beneficially interested in the charity are competent to sue, and the ordinary powers of the court are adequate to the relief they seek. On that point, therefore, the only material question will be whether the complainants are competent to sue for the establishment of this charity, and whether this court has the power to establish and enforce it?

The capacity of the complainants to sue is not denied, for they are an incorporated association; nor can the equi

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table title to the estate they claim be denied, if the devise under which they claim it shall be established; for though the estate, if vested in them, is to be held by them as trustees for the charitable purposes of the institution, and not in their own right for general corporate uses, yet the trust being for the purposes expressly authorized by the act of incorporation, no question can, on that ground, be made of its validity. If then the use to which this testator has devoted his estate be valid as a charitable use, and the estate is chargeable with it as a subsisting trust, and if the complainants are entitled either as trustees or *cestuis que trust* to the benefit of the use, why is it that this court has not the power to establish the trust, and to decree the estate to be settled and conveyed to them to the uses of the will? Why may not equity uphold the trust vested by the will in the executors, and decree it to be executed for the benefit of the charity?

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. "It is the settled decree of the court, in the construction of wills and the administration of trusts, that a trust shall never be permitted to fail, through the failure or disability of the trustee to execute the trust, but shall be supported upon the intention of the testator; that the trust is attached and fastened to the land, and that the land remains chargeable with it in the hands of the heir or devisee; and the court is in the habitual exercise of establishing and enforcing such trusts, whenever a competent party sues for its aid, and shows a case entitling him to relief. (4 Ves. 708. 5 id. 495. 6 id. 656.)

This principle was always held to be applicable to cases of charitable uses, under the statute of Elizabeth, and it has long been established as applicable to private trusts as well as charities. It certainly partakes largely of the true spirit of equity; and may be justly said to rank with the fairest features of the system.

In the cases in the English court of chancery, where that principle has been recognised, though many of them arose upon charitable uses, the principle is laid down as a general rule and not in reference to the statute of Eliz., or as applicable to charitable uses solely. The reasoning in sup

port of it is general, being founded mainly upon the intention of the testator, and applicable to other cases in common with charities.

In the case of *Brown v. Higgs*, (4 Ves. 708, 5 id. 495,) which was not the case of a charity, the point was treated as settled. In that case, an estate was devised by the testator to his nephew John Brown, in trust to receive the rents and to employ and appropriate the residue thereof, after retaining and paying thereout, the sums or portions authorized to be retained and paid thereout, to such children of his nephew Samuel Brown, as the trustees should think most deserving, and that would make the best use of it, or to the children of his nephew William, if there should be any. The trustees died in the life time of the testator; the bill was filed by the children of the nephew, Samuel Brown, to establish the will, and for an account, &c., against the residuary legatees, and the next of kin; the question was, whether the "discretionary power of selection, vested in the trustee, could devolve on the court; and if not, whether this devise could be construed as a trust for the children of the nephew. On the argument, the complainants insisted that the devise was a trust, and that it was an established rule in equity, that a trust shall not fail by the death or disability of the trustee. On the other side, the devise was denied to be a trust, and a question was raised by one of the counsel, how far the rule contended for, relative to trusts, admitting it to exist, was of general application, or confined to charitable bequests; but the master of the rolls assuming the rule to exist, and to be applicable to all cases of trusts, and acting upon it, held the devise in that particular case to be a trust, and declared the estate to belong to all the children of the nephew equally; holding that the power of selection did not devolve upon the court.

In the case of *Sonley v. The Clock-Makers' Company*, (1 Br. Ch. Cas. 81,) freehold estates were devised by the testator to his wife, for life, the remainder to his brother Charles, in tail male, remainder to the Clock-Makers' Company, in trust, that they should, as soon as conveniently might be after the decease of his wife and brother

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Charles, without issue male, or after the death of such issue under the age of 21 years, sell the premises, and that the money to arise from such sale and the rents and profits until the sale, should be divided among the testator's nephews and nieces, and their child or children. The testator's wife and brother both died in his life time; and the question was whether, the devise to the corporation being void, the heir at law took beneficially, or subject to the trust; and Mr. Baron Eyre ruled, that although the devise to the corporation was void at law, yet the trust was sufficiently created to fasten itself upon any estate the law might raise; and he stated that to be the ground upon which courts of equity had decreed, in cases where no trustee was named. The decree was, that the heir at law was a trustee to the uses of the will.

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Thus it is seen that a devise of land to a corporation, for the benefit of individuals, and not for charitable uses, was held to create a trust, which the heir at law, to whom the land descended, was decreed to perform. The corporation was disabled by the exception in the statute of wills, from taking the legal estate; and the trust being not for a charity, but for the use of private *cestuis que trust*, the company was, on that ground, also incapable of acting as trustees, and the estate from necessity descended to the heir, but nevertheless vested in him, not beneficially for his own use, but clothed with a trust in equity, for the declared objects of the testator's bounty, and which trust this court, in the exercise of its ordinary powers, was competent to enforce.

The principles fairly to be deduced from these cases, appear to me to be, that equity will regard the substance of the trust; and if the estate devised be described with sufficient certainty, and the objects of the testator's bounty designated or defined, the death, disability, or refusal to act, or other failure of the trustees, will not be suffered to disappoint the intention of the testator; but the trustees themselves, if the estate is vested in them, or the heir, or executor, where the title devolves upon him, shall be charged with trusts, and the performance of them enforced.

by the court, for the benefit of those to whom the beneficial interest is given by the will.

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If then the court has the jurisdiction to establish and enforce a trust on equitable principles against the heir or devisee, in favor of the *cestui que trust*, which by the strict rules of the common law, would otherwise fail, these complainants must surely be entitled to the benefit and the application of the principle, in sustaining the trust in their favor for the charitable purposes of the institution they represent.

But the case of *Jackson v. Hammond*, decided by the supreme court of this state, (2 Caines' Ca. in Error, 337,) was relied on as a controlling authority against the validity of the complainant's title under the devise. In that case, Israel Smith by will, dated in 1764, devised an estate in fee, to the trustees of Brookhaven, and their successors, in trust, to pay the rents and profits, after the determination of the interest of his wife therein for her dower and lawful maintenance, into the hands of the regular minister, and other ruling officers for the time being, of a baptist church. The testator died in 1780, and his widow about ten years after. The trustees of the town of Brookhaven were, at the time of making the will, and at the death of the testator, a corporation capable to take and hold lands; but the baptist church or its officers were not a corporate body, at either of these times, nor until after the 6th of April, 1784; and were incorporated under the provisions of the act of that date. An action of ejectment was brought by the heir at law of the testator, to recover the estate; and it was held by the court that the devise was void, and that the heir was entitled to recover. This then was the case of a devise of land to a body corporate, in trust for the officers for the time being, of an unincorporated religious society, and the devise was clearly void in law. In an action at law therefore, where the legal title must prevail, the heir would of course recover, unless his claim was successfully repelled by some legal defence. The defence in that case was, that the act of 6th April, 1784, concerning religious congregations, under which the baptist church had incorporated them-

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selves, entitled them to hold the lands devised to them by the will. The court decided against the defence ; but the decision did not involve the principles of this case ; for it is admitted, that the devise of the legal estate in this case, if it had been to the corporation instead of being to the executors, would have been void in law ; and the question would then have arisen, whether the trust would not be valid in equity ; and if the baptist church in the case of *Jackson v. Hammond*, had filed their bill in a court of equity against the heir, to establish the trust and enforce the performance of it, the case would have borne some resemblance to this. But the decision of the court in that case, and the opinion of the judge who pronounced it, must be taken in reference to the question then before the court, and as applicable to the question of title in a court of law ; and are not to be regarded as settling the equitable principles which are to be applied to trusts, in a court of equity.

The case of *Baptist's Association v. Hart's Executors*, (reported in 4 Wheaton, 1,) which was a decision in equity, is also cited as adverse to the complainants' claim ; but the questions in this case did not necessarily arise in that case, for *the point there was, whether a charitable bequest where no legal interest was vested, and no person designated, to take beneficially, could be supported ; and it was held that such a bequest was void ; and the court had no jurisdiction to sustain it as a charity. In the course of the argument, which took a wide range, the counsel discussed the question of jurisdiction at large, and the chief justice expressed an opinion upon it. But my views of the principles advanced in that case, in all their material bearings upon this, have already been given ; it cannot be necessary to repeat them here, and I shall forbear further comment on the case.

But the decision of Chancellor Kent, in the case of *Coggeshall v. Pelton*, (7 John. Ch. 202,) has a more direct application to the question before me. That learned jurist held in that case that a pecuniary legacy to the town of New Rochelle, for the purpose of erecting a town house for the transacting town business, is valid as a charitable bequest. It was conceded that as this town was not a

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corporation, a legacy bequeathed to it for private purposes, would have been inoperative and void, and the legacy was supported on the ground that the object of it was a general public use, as convenient for the poor as the rich; and the chancellor referred to the cases of the Attorney-General v. Clarke, and Jones v. Williams, in Ambler's Reports, as showing that bequests, with descriptions and purposes as general as that, have been held good as charities.

The principle of that case rests upon the jurisdiction of chancery over charities; and shows that in the exercise of that jurisdiction, trusts will be supported and enforced, which, under other circumstances, would be inoperative and void. The same principle applies to the trusts of real estate legally vested in a competent devisee; and though no case calling for a decision on the point may as yet have occurred in this country, the authority of that case may perhaps be considered as establishing the rule in this court.

How far the jurisdiction of the court over charitable uses does extend; whether it has the power to carry into effect a mere general charitable intent or purpose, where no particular person or specific object is designated to take the bounty; *or whether the purposes intended to be promoted by the charity may be too vague or indefinite, or the persons to be benefitted too uncertain, or too imperfectly described, to be brought before the court in the ordinary forms, for adjudication, and whether an information in the name of the attorney-general would in such cases become necessary, and would be available, or whether the charity must entirely fail, are questions which I am not called upon to decide. This charity is not exposed to those objections; for in this case the legal estate is vested by the devise in the executors as trustees for the corporation, who are themselves trustees or agents for the application of the charity to the objects of the testator's bounty. Now, if the trust in the executors is valid, and is not affected by the statute of uses, these complainants are clearly entitled to have it established and enforced; and if by the legal effect of the will, or the operation of the statute of uses, the legal estate has become void in law, yet if the trust for the orphans,

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who are the objects of the testator's bounty, is a charge in equity upon the land, and if that land descends or results to the heir, or vests in the executors, why do they not take it, clothed with the trust? How does it differ in principle from any other case of failure of trustees? and why may not the court interpose and preserve the estate for the charity on which the testator has bestowed it?

If the corporation cannot take the estate, it must either remain in the executors or result to the heir at law. But, can either the trustee or the heir be permitted to retain it to his own use? Must the benevolent intention of the testator be frustrated, merely because the agents he has chosen to dispense his bounty are incapable of acting in the trust? Such a lamentable defect of justice would be a reproach to our system of jurisprudence; and if the power of this court can reach the case, some remedy must be provided for so flagrant a violation of an acknowledged right. It is the cardinal rule of this court that the intention of the testator plainly expressed, and not repugnant to the principles of law, shall, if practicable, be carried into effect. Now, the intention of this testator was to bestow his bounty upon the charity which the Orphan Asylum Society has for the objects of its operations. It was the charity, and not the organ of its administration, which the benevolent donor meant to endow. His liberal donation was destined by him to the humane, charitable and laudable purposes of protecting, relieving and instructing the orphan children whom the Asylum might shelter under its parental wing. He has expressed his intentions with such precision, as to leave no question as to the extent or the object of his bounty. The purposes of his benevolence are acknowledged to be laudable; and if they are to be disappointed, it must be for the want of a competent trustee to perform the office of almoner. If that objection prevails, this court, contrary to its general policy will, in this case, permit a trust to fail for want of a trustee to execute it; and is this a case in which the court is to apply its narrowest rules of equity, or ought not the powers of chancery jurisdiction to be called into exercise to the full extent, if necessary, of their

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legitimate limits, for the support and protection of such an interesting charity? If, then, the estate clearly intended for the purpose of a specific charity, from the failure, or through the incapacity of the party to whom the testator has entrusted it, devolves upon the heir, or vests in the executor or trustee, it will effectuate the intention of the testator, and do no wrong to him on whom the estate has thus casually fallen, to decree him to take it charged with the trust, and to hold it for the benefit of the charity to which it is dedicated by the testator.

But if the devise in this will is to be regarded by this court as a direct devise to the complainants, or if the trust is to be considered as executed, and the premises vested in them as immediate devisees under the will, the question would still remain, whether, in either case, the legal estate has failed by reason of the disability of the corporation to take by devise? and the answer to this question will depend mainly upon the act for incorporating the Orphan Asylum Society.

By that act, (5 vol. W. 236, 30th session, cap. 179,) the society is made capable in law of purchasing, holding and conveying any estate, real or personal, to the use of the corporation, not to exceed \$100,000, nor to be applied to any other purposes than those for which the incorporation is formed: and the question is, what is intended by the term "purchase?"

This term, in its general signification, and which is the legal sense of it, includes all modes of acquiring property, except by descent, and of course it embraces a devise. Then is not this corporation, which is made capable in law of purchasing, necessarily made capable to take by devise? If so, it so far dispenses with the exception in the statute of wills, and there would seem to be no doubt of the validity of the devise. But it is said that the word "purchase" has another meaning, and is understood in its popular sense to be the acquisition of property by one person from another for a valuable consideration; and it is contended that the term is to be taken in that limited sense as being the common acceptance of it. One answer to this

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may be, that the legislature has not indicated any intention to confine the signification of the word to such narrow limits; and being used without explanation, the rule is, that it is to be understood in the sense the law attaches to it. Besides, what reason is there for limiting it to purchases for value? The intention was to give a general power to hold lands, and the legislature has fixed the limit of amount, and has put no other restriction on them. Why then is the capacity to purchase to be restricted by construction to purchases for value?

It was suggested that the provisions of the act were not intended as a grant of power, but as a restraint and limitation of the general right which the corporation would otherwise acquire by the act of incorporation, as incident to the corporate capacity. But I see no ground for such an intendment. On the contrary, the act confers a general and unqualified capacity to purchase in express and affirmative terms; and then subjoins the limitation of the power in a proviso restraining the amount of the estate in value which the corporation is to hold, and the purposes to which it is to be applied. Now can such a legislative grant of capacity to purchase be construed as a restraint of the power which would otherwise be incident to the corporation? Was it intended to limit the capacity of purchasing to purchases for value and to prohibit the corporation from accepting donations of either real or personal estate? Such would seem to be the consequence of the limited construction of the act; for if the corporation is restrained in the acquisition of real estate to purchases for value, the same restriction equally applies to personal property; the clause of the act conferring the capacity to purchase expressly applying to both real and personal estate. But it could not have been the intention of the legislature to restrict the corporation in the acquisition of personal property to purchases for valuable consideration, nor to prohibit them from accepting donations of money or chattels. The defendants themselves disclaim a construction so palpably absurd, and have admitted the right of the complainants to the pecuniary legacies bequeathed to them

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by the will. And is it not fair to conclude that the legislature, in thus including real and personal in the same provision and license to purchase, intended to use the word "purchase" in its more comprehensive sense, and to enable the corporation to acquire either real or personal estate by any mode or purchase?

But it is said that devises of land to corporations are prohibited by the statute of wills, and that the special act of incorporation under which the complainants derived their powers, could not intend to give them a capacity to take real estate against the provisions of a general statute; but that the enabling clause of the act of incorporation must be held to mean to enable them to acquire it by any other means than devise. If my construction of the exception in the statute of wills is correct, that interposes no obstacle of the capacity of the corporation to take by devise under the powers conferred upon them by their charter; for the effect of the exception in the statute of wills being merely to leave corporate bodies under the disability to take by devise, that disability was removed from this corporation by the capacity imparted to it by the act of incorporation. Nor do I perceive any greater difficulty, from the construction of the statute of wills contented for by the defendants; for, assuming that the statute of wills did prohibit devises to bodies corporate, it was surely competent to the legislature to relax or repeal that prohibition; and *when a particular corporation is authorised by the

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If, therefore, the complainants, by being made capable of purchasing lands, are made capable of taking by devise, the restraint or prohibition of the statute of wills, if that statute does prohibit or restrain the devise of real estate to corporate bodies, was removed from the complainants by the charter of incorporation. The question, then, turns upon the act of incorporation, and not upon the general statute of wills; and if, by the terms or just construction of

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the act of incorporation, the complainants have the capacity to take by devise, the exception in the statute of wills cannot disable them from taking. But it is said that the prohibition or disability arising from the exception in the statute of wills attaches to the devisor, and that he has no capacity to devise to a corporate body. The exception acts upon both the devisor and devisee, and equally disables the one from devising and the other from taking under the devise. There is no solidity, therefore, in the objection that the incapacity to devise attaches to the devisor; for the cause of the incapacity of devisors, under the statute of wills, to devise to corporate bodies, is the incapacity of the corporation to take by devise; and the legislature, by conferring a capacity on the corporation to take, by necessary implication gives to devisors the power to devise to the corporation thus made capable of taking by devise. And if, therefore, the legal operation of the exception in the statute of wills, was to disable the testator from devising to a corporate body, the operation of the act of incorporation was to enable him to devise to these complainants, if that act gave them a capacity to take by devise. The question consequently must be upon the construction of the act of incorporation, whether the complainants, by being made capable of purchasing lands, are made capable of *taking by devise? And the solution of that question must depend upon the construction to be given to the word "purchase."

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In the case of *Radcliffe v. Roper*, (10 Mod. 89,) first decided in the court of chancery, and afterwards in the house of lords, and which is reported in 10 Modern Reports, in Equity Cases Abridged, and in Brown's Parliamentary Cases, the construction of the word "purchase" underwent much discussion, and was finally settled in favor of the legal and comprehensive sense of the term.

The case was, that a papist devised his lands to four trustees, two papists and two protestants, to be sold for payment of debts and legacies; and by a codicil, amongst other legacies, he devised the remainder, *whether in lands or personal estate*, to two papists and their heirs; and the question was, whether this was a good devise, so as to dis-

inherit the heir at law, who was a protestant; or whether it was void by the statute of 11 & 12 W. 3, c. 4, for preventing the growth of popery?

By the act of 11 & 12 Will. 3, it was provided, first, that from and after the 29th of September, 1700, persons educated in the popish religion, or professing the same, who should not, within six months after attaining the age of eighteen years, conform to the requisitions of the statute, should personally be disabled, and made incapable to inherit or take by descent, devise or limitation, in possession, reversion of remainder, any lands, tenements or hereditaments; and that during his life, and until he should conform, his next of kin, being a protestant, should have and enjoy the estate without being accountable for the profits, but punishable in treble damages for wilful waste. And *Secondly*, that from and after the 2d of April, 1700, every papist or person making profession of the popish religion, should be disabled, and was thereby made incapable to purchase, either in his own name or in the name of any other person, to his use or in trust for him, any lands, profits out of lands, tenements, rents, terms or hereditaments; and it was declared that all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered or done, to or for the use of any such person, or upon any trust or confidence mediately or immediately to or for his benefit or relief, should be utterly void and of none effect, to all intents, purposes and constructions whatsoever.

For the protestant heir, it was contended that the devise of the residuary interest described in the will was a devise of land, and that the word "purchase" in its legal sense includes devise; and that the devise, therefore, of this interest for the benefit of the two papists, was void. But on the other side, it was insisted that the devise in question did not come within the prohibitions of the statute; as well because it was the bequest of the residue of the proceeds of the sale of the land, and not of the land itself, as because the statute did not, by disabling the papist to purchase, necessarily disable him from taking by devise; and it was insisted that the word "purchase" was not to be taken in

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its technical legal sense as opposed to descent, but was to be understood in the vulgar acception of the term, as meaning an acquisition of an estate by the party's own act and to illustrate and enforce the argument, reference was had by the counsel to the prior clause of the section respecting infants, where the statute makes use of the words "devise, limitation and descent;" and it was urged that the legislature, if they understood the word "purchase" in its legal acceptance, might have used that word to supply the place of both "limitation" and "devise," but that, by using both the words "devise" and "limitation" in the first provision, and omitting the word "devise" and substituting the word "purchase" for limitation in the second provision, an intention was clearly manifested to use the word in its limited sense; and it was observed that the words immediately following the term "purchase," viz. "in his name or to his use," seemed to restrain and confine the word "purchase" to some act to be done by the party to whom the estate moves. The court expressed no opinion as to the meaning of the term "purchase," but decided the cause upon the other point of the case; and the chancellor, with the consent of all the judges, except Parker, chief justice, resolved that the devise of the surplus money after debts and legacies paid to the papists, was a good devise, notwithstanding the statute disabling papists from purchasing lands, the surplus money being a personal interest, and therefore not made void by either the words or intention of the act. But from this decree there was an appeal to the house of lords, and three questions were made upon the argument of the appeal, the third of which was whether a papist was disabled by the act of parliament from taking land by devise? It was insisted on the part of the appellant that he was; and it was said that there was no one word in the law of a more determined fixed signification than "purchase;" that it stood by law opposed to descent, and whoever does not come to land by descent, is, in the language of the law, said to take by purchase; and that acts of parliament are to be understood in a legal sense, unless the subject matter of the act apparently hinders it. On the

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other side, for the respondents, it was contended that the word "purchase," in the vulgar and common acceptation of it, does not import "devise," but is to be defined to be the possession of land that a man comes to by his own act; and a train of reasoning is given to show that the word "purchase" could not be so construed as to include devise, without making the act contradict itself. The decree was reversed by a great majority; and the decision necessarily included the determination of the point, that the disability to purchase disables from taking by devise. (10 Mod. 230.)

On the argument in the court of chancery, the third clause of the act, declaring that all estates to be made, suffered or done for the use or benefit of such persons as were disabled by the act to purchase, should be void, was relied upon by the counsel for the protestant heir in support of the construction of the word "purchase" contended for by them, and as showing that devises were intended to be embraced in the term; but the answer was that the clause thus relied on could not make a devisee a purchaser, because it is not an independent clause, but explanatory of that which precedes it, the word "such," plainly coupling the two together; the former incapacitating a papist to purchase, and the latter providing that if he did so, the purchase should be void. But the main point, both in the court of chancery and the house of lords, upon that part of the case, was the general question whether the word "purchase" included "devise; and in the house of lords the stress was upon the legal construction of the word "purchase," and it was forcibly urged that legislators are presumed to speak the language of the law, and to know what the legal import of words is, and therefore acts of parliament are to be understood in a legal sense, unless the subject matter of the act apparently hinders it; and these I apprehend were the grounds of the decision of the court. This case was decided in the thirteenth year of the reign of Queen Anne.

Not long afterwards, in the sixth year of the reign of George the First, the case of Mr. Ratcliffe occurred, (1 Str. 267,) in which the point was again agitated, and judicial opinions expressed upon it. The case was that James earl

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of Derwentwater, who was a papist, being seised of the premises in question, in fee tail, under a settlement which had been made of the same by Francis Ratcliffe, his grandfather, for the purpose of docking the entail, conveyed the estate to two persons who were protestants, in order to make them tenants of the freehold, till a common recovery was suffered; and the same being situated in the county palatine of Durham, two several recoveries were had and suffered of the estate, both of which were declared to be to the use of the earl in fee; and earl James being thus seised of the fee on his marriage, settled the same upon himself for life, then to his lady for life, with remainder to the first and every other son of the marriage in tail made, with several remainders over, and proper limitations to trustees to preserve contingent remainders. The marriage took effect, and Mr. Ratcliffe was the eldest son; earl James was attainted of high treason and executed, and all estates tail of persons attainted of treason, being *vested by statute in the crown in fee, the commissioners seized this estate as forfeited by the attainder of the earl James, upon which Mr. Ratcliffe put in his claim, insisting that his father was only tenant for life, and that he, upon the death of his father, became entitled, and then had the right to the remainder in tail. The claim was disallowed; the commissioners being of opinion that earl James was disabled by 11 & 12 W. 3, to suffer the recovery, and consequently remained tenant in tail under the settlement of Sir Francis, his grandfather, and so the crown was entitled to the fee. The claimant appealed to the delegates, consisting of five of the judges, and the cause was argued several times at the bar. The great question was, whether a papist tenant in tail, could, since the statute of 11 & 12 W. 3, ch. 4, suffer a recovery to the use of himself in fee. Mr. Justice Fortescue was of opinion that the recovery was a purchase within the meaning of the act, and that the claim was properly disallowed, and the decree ought to be affirmed. The other four judges held that the recovery not being the acquisition of any new estate or interest, but merely a modification of the estate he had before, operating as a bar or extinguishment of a

limitation, and changing the course of descent, but not conferring any new interest upon the owner of the inheritance, was not a purchase within the meaning of the act. And the claim was held valid, and the decree which disallowed it was reversed. But all the judges who mentioned the point, concurred in the opinion that a devise is a purchase within the act. Three of the judges refer to the case of *Roper v. Radcliffe*, as establishing the principle that a devise is a purchase; and all the judges express their decided approbation of that principle, except baron Montague, whose opinion turning upon another point of the case, he declined entering upon this. The arguments urged by the judges who spoke to the point, illustrate and confirm the doctrine of the case of *Roper v. Radcliffe*. One of them observes that the word *purchase* has a known signification, in which it has constantly been used *by professional men, without any variation; and the court cannot depart from it without an express direction in the body of the act. If the legislature had intended to confine the disability to purchasers for valuable consideration they would have used some expression or have introduced some provision to indicate that intention; but the word, as employed in the statute, being unrestrained, and without qualification, and neither the object of the legislature nor the general intent, as collected from the whole statute taken together, requiring it to be understood in a more limited sense, the legal meaning of the word must prevail.

If it be objected that this case of *Ratcliffe*, in determining that the conveyance by common recovery was not a purchase within the meaning of the act, has overruled or qualified the principle of the prior decision, the answer is, that the ground of the case of *Ratcliffe* was, that the destruction of the estate tail by the recovery and the substitution of an estate in fee in the same owner, and for the same lands, was not a purchase; that it was not the acquisition of a new estate, but a change only in the tenure of the old estate. Mr. Justice Tracy, in his argument, defines a purchase to be an acquisition *rei alterius*, either by free gift of the former owner, or for a valuable consideration; and he

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relied on 1 Ins. 18, b. as an authority in support of his definition.

Why does not the principle of these decisions apply to this case of the Orphan Asylum Society? If the term *purchase*, unqualified by other words, when used in a disabling statute, comprehends an acquisition by devise, why must not its meaning be the same in an enabling act? If a party who is disabled by statute to purchase, cannot take by will, because a devise is a purchase, why is it that a party who is made capable in law of purchasing, shall not have a capacity to take by devise, when a devise is held to be purchase? My understanding is unable to discern a solid distinction; and I refer to the cases already cited to show, that the rule applied to devises of land to papists, prevails in other cases of disability "by statute to take by purchase, and that the same rule is equally applied to enabling statutes. The chief justice in the court of K. B. in his second argument in the case of *Roper v. Radcliffe*, refers to the statute of 15 Rich. 2, c. 5, which in extending the statute *de religiosis* to certain civil corporations, uses these terms: "From thenceforth they shall not purchase to them and their commonalties," &c., and he says that it was never doubted but that it would extend to what should be given to them as well as to what they should buy; and commenting upon the word "purchase," and repelling the suggestion of a difference between the words "to purchase" and "to take by purchase," he says it is clear they are all one, and the verb "to purchase" is evidently used in the same sense as "to take by purchase," and that in 1 Ins. 2, a. b. it is used so near a dozen times; and he adds, that the licenses to abbeys after the statute of Merton, are generally only leave to purchase, (so are charters to corporations,) but that no one ever doubted but that thereby they might take what was given them, as well as what they should buy and pay for.

In the case of the *Attorney-General v. Bowyer*, (3 Ves. 727, 728,) where the devise was of the rents and profits of lands in trust for the purpose of purchasing grounds and building a college thereon, and the further trust to obtain, a

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charter and license, the chancellor observes, that the case would have been exactly the same, supposing the devise had been to an existing college, which had exhausted its license, to hold in mortmain; for until that license had been extended on the part of the crown, the college having no power to hold in mortmain, could not have taken any legal interest in the land; thus distinctly intimating that a body corporate, authorised by license to hold real estate, may take lands by devise; and Wooddeson, in his lectures on the laws of England, (9 vol. 385,) states, that corporations in general are incapable of being devisees of land, unless they have a license to purchase by mortmain. That commentator must therefore have understood the law to be, that an authority or license to purchase lands, was sufficient to enable a corporate body to take them by devise.

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*The full force of these authorities and this reasoning, applies to the case I am now considering. The terms used by the legislature in the act to incorporate the Orphan Asylum Society are large and comprehensive. The society is made capable in law of purchasing, holding and conveying any estate real or personal, for the use of the corporation; and by the last section of the act, it is declared that the same shall be construed benignly and favorably, for every humane, charitable and laudable purpose therein contained. The only limits to this extensive grant of power, are that such estate shall never exceed in value \$100,000, nor be applied to any other purposes than those for which the corporation is established. No expression is found in the act qualifying the word "purchase," or showing any intention to limit it to purchases for consideration. Why then is it not to be understood in its legal sense? The rule of construction established by the cases, requires it to be interpreted according to the comprehensive meaning the law attaches to it; and if the word admits of two constructions, and there is room to doubt which was intended, it was by the express direction of the legislature to be construed favorably for the purposes of the institution; and that direction cannot be satisfied by any construction

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that narrows the capacity of the corporation to take beneficial interests for the furtherance of those purposes.

An act of the legislature with us must surely have as much efficacy as the license of the crown in England, and ought to receive a construction as liberal and beneficial for the corporation it creates. Upon the whole matter, therefore, my conclusion is, that the Orphan Asylum Society, are enabled by their charter to take lands by devise, and may therefore lawfully enjoy the bounty of the testator, and dispense it in the charity they administer, without hindrance from the exception in the statute of wills, even if the lands should be held to be vested immediately in the corporation itself.

These are my views of the merits of this cause ; and if I am correct in them, the objection taken by the defendant's counsel to the bill for want of parties, cannot be sustained. The ground of that exception is, that the legal estate, in the *events that have happened, has resulted to the heir, and become vested in him by descent. Is that ground tenable ? Where the legal estate never vests in the devisee, as a general rule, it descends or results to the heir ; and on the same principle, if the devisee takes a partial interest in the estate, or a surplus of interest remains after fully satisfying all the trusts or purposes of the will, the heir may be entitled to the residue. But where the whole legal estate is devised to a trustee upon trusts which are perpetual and definite, and exhaust the whole interest of the testator, how can that legal estate result or descend to the heir at law ? This testator, by devising his estate to persons capable of taking lands by devise, prevented that estate from descending to his heirs ; and whatever may become of the trust for the complainants, the legal estate is in the executors as devisee.

In the case of *Doe ex dem. Toone v. Copestake*, (6 East, 328,) it was said by the chief justice, " that the legal estate being given to trustees, must rest with them ; and they must be entitled to recover at law upon the legal title, in whatever manner the court of chancery may afterwards deal

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with the application of it." In that case, the testator devised a messuage and premises to the plaintiffs upon trust, after payment of debts and legacies, to apply the overplus or reversion of the devised premises in such manner as the trustees, and the officiating minister of a Methodist congregation in the will mentioned, should from time to time think fit to apply the same. This was contended on the part of the defendant, to be a devise to charitable uses, and void by the statute of 9 Geo. 2, c. 36. But the plaintiffs denied it to be a devise to charitable uses, and insisted, that if it was so, the legal estate having passed to them as trustees, they were entitled to recover at law. The court held it not to be a devise to charitable uses, and so not within the statute, and gave judgment for the plaintiffs.

The principle of that case appears to me to apply to this. In this case, the devise to the executors took effect, and the estate vested in them as trustees to the use of the will, and continued in them during the life time of the testator's child, and it must *still rest with them*.

*The testator in this will, has made the provision for his heir at law, which he intended for him, and has expressly devised all the residue of his estate to the defendants, subject to the trusts of his will; and if the legal estate cannot unite with the use, it remains in the trustees, and it is for this court to determine upon the equitable principles applicable to the case, whether they do not still hold it clothed with the trusts of the will for the benefit of the charity. The heir at law then was not a necessary party to the suit; but the bill is properly filed against the trustees. And even if the legal title should be held to be vested in the complainants, the trustees, who continue in the possession of the estate, and the receipt of the rents and profits, will be accountable to them for the same, and the complainants are consequently entitled, whether held to be the legal or the equitable owners, to an account, and to be let into the enjoyment of the estate.

Being satisfied, therefore, that the trust vested by this will in these executors for the complainants, was, in its origin, a legal and valid trust, and that it still subsists and

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remains in full force ; or that if it has been executed by the statute of uses, and the legal estate has passed to the complainants, or that estate is otherwise vested in them, they are well entitled to hold it for the charitable purposes to which it was devoted by the testator ; my opinion is, that the complainants are entitled to have the lands conveyed to and settled upon them ; to be applied by them to the charitable purposes of the society, and that they are to be let into the possession and enjoyment of the estate, and to have an account of the same, and of the rents and profits thereof from the trustees, and I shall decree accordingly.

J. Platt & J. V. Henry, for the appellant.

S. Boyd & D. B. Ogden, for the respondents.

The points and authorities are so fully considered in the opinions of his honor, the chancellor, in assigning the reasons for his decree, and the judges of this court, that it is deemed unnecessary to give the arguments of counsel ; and the more especially as it will be perceived that the cause turned here upon a point of construction on the will, and a clause in the act incorporating the respondents.

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Construction
of the will.

WOODWORTH, J. The will of the testator declares, that if he left any child alive at the time of his death, the executors should receive the rents and profits for the benefit of such child, until it should attain the age of 21 years or marry.

It contained
a direct devise
to the respondents.

The next clause devises the rest and residue of the real and personal estate to the respondents, to take effect immediately after debts and legacies are paid, if the testator should leave no child ; and if he should leave a child, then upon the death, marriage, or attaining of 21 years of age of such child.

From this statement, it is evident that had there been no child, the devise was direct to the respondents ; and in that event, it was undoubtedly intended they should take immediately. But there was a child ; and consequently no es-

tate passed to the respondents at the death of the testator. The latter part of the preceding clause is to be taken in connection with that giving the rents and profits to the child if any was left, inasmuch as the executors were to apply the rents and profits, until marriage or 21 years of age. The testator suspended the vesting of the estate in the respondents until the happening of either of those events. Upon the contingency taking place, *the devise is direct to the respondents.*

Thus far the intent is plain ; but it will be observed that the will had not yet declared in whom the legal estate should be vested from and after the death of the testator, until the death, marriage, or lawful age of the child that might be left. As the executors were to receive the rents and profits if the contingency contemplated should happen, it was advisable to give them the legal estate during the continuance of this trust ; and accordingly we find that the next clause in the will makes such a provision. It devises to the executors all the real estate *subject to the trust aforesaid.* This manifestly refers to such trusts as the executors were to perform. What are they ? No other trusts were imposed on them, excepting that they should apply the rents and profits for the benefit of the child, in the manner the testator had designated. * They did not hold the real estate in trust for the respondents, to be conveyed to them on the happening of a certain event, for this (to my mind) conclusive reason ; there was no necessity that they should hold for the respondents, because the testator had declared that, on a certain contingency, the estate should go to the respondents. That event has happened ; and, therefore, by force of the will, (if they are capable of taking,) they took the legal estate directly. They needed not the aid of trustees to pass this estate to them. I consider their title as accruing independent of any act or thing to be done by the trustees.

Then follows a further direction, which is somewhat at variance with the disposition made before. The testator proceeds to declare that when the child shall attain 21 years, or marry, his real estate should be sold by the

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executors, and one half of the proceeds to be paid to such child. Now upon the established principle of collecting the intent from the whole will taken together, and reconciling discordant parts with each other, the question arises, what is the effect of this clause? In the first place, I think it must be conceded that it clothes the executors with an additional trust. In a certain event they are to sell, and pay half the proceeds to the child. How is this clause to operate upon the preceding devise, which declares that on the death, marriage, or attainment of 21 years by the child, the respondents are to take all the real and personal estate? They cannot stand together. I think the effect of the last clause is, to qualify and diminish the *quantum* of interest which had before been given to the respondents, provided the child married, or attained 21 years. Instead of the whole, which the words of the preceding part give, the testator has, in the conclusion, declared that his child shall receive half. This, then, operates as a diminution of the respondent's interest *pro tanto*. It also changes the manner of conferring on them the testator's bounty. Under the first clause, the estate, such as it was, would pass to them. Under the latter, they are restricted to one half; and as the executors were to sell the estate, had the contingency happened, then and in that case their claim would be for half of the money, not half of the land. Upon the *supposition that the child had lived to 21 or married, I admit that the legal estate would have remained in the executors, until they had performed the trusts before specified; and had they refused to pay one half of the proceeds of the sale, the respondents would be entitled to relief. Such are my views as to the construction of this will. If they are correct, then it follows that, as the testator left a child, the estate did not vest in the respondents at his death; but it vested in the executors subject to the trusts I have mentioned; and such estate so vested in the executors, ceased on the death of the child. The objects for which it was created then ceased. There were no rents or profits to receive for the benefit of the child, nor could there be a sale of the

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estate. The death of the child was an event which deprived the executors of all further power or control over the real estate, and vested it in the respondents. If so, the estate was devised to them directly.

If the construction given is not erroneous it is a conceded point that the devise is void by reason of the exception in the statute of wills, unless the authority to purchase, given by the act incorporating respondents, includes the right to take by devise; which forms the remaining point in this cause.

It is a well settled rule, that where there is a discrepancy or disagreement between two statutes, such exposition should be made as that both may stand together. In the present case, there is no express authority in the act of incorporation to take by devise; but it is contended that the term *purchase* includes *devise*, as well as an actual purchase for valuable consideration. If it be admitted that such is the legal import of the term, it appears to me that does not decide the question. The inquiry is, ought the term to be construed in its most comprehensive sense, when, by so doing, the effect is to repeal the express words of a prior statute? or in a more limited sense, according to the popular acceptance; thus leaving the former act unimpaired?

It is laid down in 19 Vin. Abr, 525, pt, 132, that repeals by implication are things disfavored by the law, and never allowed of but where inconsistency and repugnancy are plain and unavoidable; "for these repeals carry along with them a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another; and such repeals have been ever interpreted so as to repeal as little of the preceding law as possible." [1]

It is also a rule of law, that all acts in *pari materia*, are to be taken together as if they were one law. The statute of wills prohibits a devise to a corporation; the act incorporating the Orphan Asylum Society declares that they may

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The act incorporating the respondents by giving them power to purchase is not a repeal *pro tanto* of the exception in the statute of wills.

Repeals by implication disfavored by the law.

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Acts in *pari materia* to be taken together.

[1] Bowen v. Lease, 5 Hill, 221.

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purchase real estate. In the most extensive signification of the word *purchase*, it includes a devise, and therefore relates to the subject which by the statute of wills is accepted. These statutes, I apprehend, ought to be construed together; and in as much as the right claimed is, by the former statute, expressly denied, it would seem to be more congenial to the spirit of both acts, to understand the word *purchase* in a restricted sense, and as so intended by the legislature. The consequence of such a construction is, that the statute of wills has full operation, and the term *purchase* is confined to such other modes of acquiring real estate as do not include a devise. The legislature may be considered as granting to this corporation the right to purchase subject to other existing statutes, and not as conferring a right to purchase without restraint. It cannot be that such a clause was intended to overleap positive restrictions found in other statutes. On this principle, I do not perceive why the statute of frauds, or that against maintenance, may not be passed over as in effect repealed, so far as the right claimed by this corporation is concerned. And yet it will not be pretended that the term *purchase* is to be carried to that extent. If not, what are the grounds upon which the restriction rests? Manifestly these: You may purchase and hold real estate it is true; but in making the acquisition, it must be remembered that the laws of the state have declared certain requisites essentially necessary to perfect a title; and in certain cases have denied the right altogether. Whatever can be purchased consistently with these laws, is *granted*; what can not is *denied*.

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The right to purchase is incident to a corporation.

Again; the right to purchase is incident to a corporation, and would exist if the statute had not conferred the right. But I presume it will not be contended that this incidental right, had the act of incorporation been silent, would have authorised the corporation to take by devise. Why then should the term *purchase*, when used in the act, have a more extensive signification than it would have as incidental to the power of the corporation? It seems to me that in both cases the meaning of the term is the same. The act conferred no additional power in this respect. The princi-

pal object of this clause was, to limit the amount of property the corporation was authorised to hold.

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That the right to purchase in a corporation does not include the right to take by devise, appears to have been the opinion of the supreme court in the case of *Jackson v. Hammond*, (2 Cain. Cas. in Err. 387.) The opinion was delivered by Mr. Justice Benson. The construction of the act of April 6th, 1784, enabling churches to incorporate themselves, was under consideration. The act declares that the trustees appointed under it shall have good right and lawful authority to take, acquire and purchase lands, tenements and hereditaments. The expressions are as ample as in the act incorporating the Orphan Asylum Society. It is manifest, however, the court did not consider those words as conferring a right to take by devise. It was contended, that by the statute of the 6th of April, 1784, enabling churches to incorporate themselves, they are constructively, (with respect to lands possessed or held by them *at the time of their incorporation*,) made capable of taking by devise. The court held that the term *devise* in that act referred to goods and chattels, not to lands and tenements. And it may here be observed, that whether that construction was well founded or not, the term *devise* there used had reference only to such property as the church or congregation may have held before, and at the time of incorporation. As to future acquisitions, *the 5th section of the act regulates them in the terms I have already stated. Under that clause it was considered that a power to take by devise was not granted. It was not, it is true, the direct question before the court; but the view taken is nevertheless entitled to respect, and is of considerable weight in deciding the construction of similar words in a subsequent statute. From the scope of the opinion, I infer that the learned judge entertained no doubt on this point. He observes, "the only manner in which, had they been incorporated, they were capable of taking, being by gift or grant, and not by devise;" and again, when speaking of the construction contended for, that the word *devise* applied to lands which the church held before incorporation, he fur-

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ther observes, "if this construction is to obtain, then this consequence will follow : that the legislature must be supposed to have intended to give to a church a capacity to hold lands *as it were before their incorporation*, and refuse to them a capacity to take, and consequently to hold lands acquired after their incorporation ; *and without a reason for the discrimination.*" It was therefore considered that, after incorporation, the corporate body could not take by devise.

I have thus very briefly given my views as to the construction of this statute ; and arrived at a conclusion that the exception in the statute of wills is not affected by the grant of powers to the Orphan Asylum Society.

It is unnecessary for me to discuss the various other questions which have been examined by his honor the chancellor ; as my opinion upon the whole case rests on this ground ; that, on the death of the child, the estate was *devised directly* to the respondents ; that after that event, there were no trusts remaining for the executors to execute, those imposed upon them by the testator having ceased ; and that the devise *being void by the statute of wills*, the decree in the court below should be reversed.

SUTHERLAND, J. concurred.

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*SAVAGE, Ch. J. being related to the appellant, gave no opinion.

ALLEN, DAYAN, ELSWORTH, HAGER, HART, LAKE, McCARTY, McMARTIN, WATERMAN and WILKESON, Senators, concurred.

CRARY, Senator. (After stating the facts.) The respondents claim the whole residuary estate of the testator, The claim to the real estate is resisted, on the ground that the respondents, being a corporation, are disabled by the exception in the statute concerning wills to take by devise

By this act, it is provided, that any person having any estate in lands, may at his own free will and pleasure, give and devise the same to any person or persons, (except

bodies politic and corporate,) by his last will and testament.

This exception is found in "an act to reduce the laws concerning wills into one statute," passed 3d of March, 1787. (See 1 Greenleaf's ed. L. 387.) At that period the people of this state could not have been jealous of corporate bodies, for very few existed. We must then look for the reason of this exception to some other cause; and as we find it in the statute of Henry 8th, it is most likely it was adopted, upon the authority of the parliament of Great Britain; and no question having arisen upon it in this state, the exception has been continued in the subsequent revisions of the laws.

If the right to dispose of real estate by will is created by statute, then the legislature may qualify the right; but if it existed before the statute, then the legislature by affirming it in one part, cannot restrain the exercise of it in another.

Sir William Blackstone says, (2 Com. 373,) "it seems sufficiently clear, that before the Conquest, lands were devisable by will. But upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feudal doctrine of non-alienation without the consent of the lord."

Paley, in his Philosophy, (ch. 13,) says, "since the Conquest, lands in this country could not be devised by will, till within little more than two hundred years ago, when this privilege was restored to the subject, by an act of parliament in the latter end of the reign of Henry the Eighth."

Robertson, in his history of Charles the Fifth, (1 Vol. note 8 of proofs and illustrations,) says, "the victorious troops divided the conquered lands. Whatever portion of them fell to a soldier, he seized as the recompense due to his valor, as a settlement acquired by his own sword. He took possession of it as a freeman in full property. He enjoyed it during his own life, and could dispose of it at pleasure, or transmit it as an inheritance to his children. Thus property in land became fixed. It was at the same time

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allodial, that is, the possessor had the entire right of property and dominion."

These references clearly show the right to dispose of real estate, by will in England, previous to the statute of Henry the Eighth. And it is worthy of remark, that while this right continued, the tenure by which lands were held in England was allodial; the precise tenure by which they are held here. (a)

The devise
was valid at
common law.

Thus, it would seem that the devise of the real estate for the benefit of the respondents, is not void from the testator's incapacity to make it; but valid at common law.

The respond-
ents derived
power to take
from their act
of incorpora-
tion.

The next question is, as to the ability of the respondents to take and hold real estate. That is settled by the act incorporating them, (30th sess. p. 508, § 1,) by which it is enacted that "The Orphan Asylum Society in the city of New York, by that name shall be capable in law of purchasing, holding and conveying, any estate, real or personal, for the use of the said corporation: Provided, such estate shall not exceed in value one hundred thousand dollars."

The value of the estate belonging to the respondents no where appears, and it is not to be presumed that it exceeds the amount allowed to be held by their charter.

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*This act of incorporation appears to have been passed on the 7th of April, 1807; and may be referred to for another purpose: It is the sense of the legislature, after the experience, under the statute concerning wills for twenty years, that the policy of the exception in that statute was wrong, at least so far as it respected the Orphan Asylum in the city of New York, and it may be questionable whether the exception is not thus far abrogated.

(a) The remark of the learned senator would seem to apply to such lands only as were granted by the people of this state before or since 1776; not to grants before that time by any other authority. (Vid. "act concerning tenures," sess. 10, c. 36, s. 3 and 6, 1 R. L. 71.) The premises in question, situate in the city of New York, probably come within the 3d section; and are therefore holden in free and common socage, having been granted by the king or colonial government, before 1776; not by the people, whose grants alone are *allodial*.

It was assumed in argument, that if the testator was not disabled by the exception, from devising to the Orphan Asylum, it was not in the power of the legislature to prevent devises to any corporate body, and to any extent; but it was not pretended that the legislature might not repeal the exception.

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The Orphan Asylum have the capacity to take and hold real estate to the amount of one hundred thousand dollars; and are not disabled to take by devise. On what principle then can it be said they shall not take?

Suppose the statute had provided; that the Orphan Asylum might take by devise; can it be pretended that a devise in that case would not be valid?

If the statute had enacted that the Orphan Asylum might take by devise, it would have been a limitation upon the right to take generally; and might possibly be considered as excluding the right to take in any other way; for the right, to take and hold generally includes all the ways and means by which property can be acquired.

Which of these statutes then shall we give effect to? It is a familiar principle, that a new statute repeals an old one, if inconsistent with it. In the present case, the statute concerning wills prohibits a devise to a corporate body; and twenty years afterwards the legislature incorporate The Orphan Asylum Society in the city of New York; and declare the society, by that name, capable in law of purchasing, holding and conveying any estate, &c. I need not mention that title by purchase includes that by devise.

A new statute
repeals an old
one, if incon-
sistent with it.

Thus it will be seen that both statutes may stand together and that is desirable, whether inadvertently or advisedly passed.

*But there is another view of the subject, which would induce me to be in favor of affirming the decision of the chancellor.

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All tenures of land granted by the people of this state, &c., shall be and remain allodial and not feudal. (1 R. L. 71.) (b)

(b) But see note (a) ante, 511.

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This act was passed before the act concerning wills.

**Allodium*, as defined by Blackstone, is the land possessed by a man in his own right, without owing any rent or service to any superior. (2 Bl. Com. 104.)

The absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property. (3 Bl. Com. 119.)

It is the last, that of private property, which has been invaded by the exception in the statute concerning wills.

Whether the legislature have power to restrain devisees to corporate bodies, examined.

And I now advert again to the argument, that if the devise in question is not within the exception in the act concerning wills, it is not in the power of the legislature to restrain devisees to corporate bodies. And I ask why it should be?

The very definition of municipal law limits the power of the legislature to commanding what is right, and prohibiting what is wrong.

If the legislature can restrain us as it respects our charitable donations, they may also compel us to make them; for whatever is a subject of legislation may be commanded as well as prohibited.

And if the legislature can declare a devise to the Orphan Asylum invalid, they may, upon the same principle, make us pay tithes of all we possess.

This is a free representative government; and one of the prominent features by which it is distinguished from a despotic one is, the preservation and protection of individual right; for it can make no difference with the citizen what the form of government is that oppresses him, and deprives him of his right; whether it consists of one tyrant or one hundred and sixty, if his suffering and deprivation are the same.

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*It is difficult to conceive on what principle men elected by the people for public purposes, can limit and restrain individuals in the exercise of their legitimate rights.

If individuals give up any part of their rights by becoming members of society, it is that they may obtain protection for such as remain; and on the same principle that

allegiance is demanded by the government, protection is claimed by the citizen; and if not granted, the original compact is broken.

If courts of justice have occasion to advert to first principles the object should be the protection of individual right and not to confirm legislative usurpation. And in a government founded on principle, it is the duty of the judiciary department to decide in favor of individual right, when it is required to be done, on fundamental principles, though it should be to declare invalid an act of the legislature. The contest which ended in the separation of these United States from Great Britain, was a contest for individual right, intended to be secured by the Constitution of the United States. But of what avail is it, that no law shall be passed impairing the obligation of a contract, or that private property shall not be taken for public use, without a just compensation, if the paramount right to dispose of our property by will is denied us?

In a government founded on principle, the application of it is the only limitation of power. The judiciary, although the weakest, is the most independent branch of the government, and the only branch that can, by the force of principle, limit and restrain the exercise of power. Can it then admit of a doubt, that it is the duty of the judiciary so to apply principle as to prevent any encroachment by the legislature upon individual right?

Although I have taken a view of the subject somewhat different from the chancellor, I am however satisfied with the different views which he has taken. Yet I think his decree ought to be so modified as to allow the appellant his costs; inasmuch as he has acted under the advice of counsel, and I see nothing reprehensible in his conduct.

*STEBBINS, Senator. The merits of this case do not appear to me to lie beneath the mass of learning which has been displayed in the investigation of the case.

As I view it, the inquiries whether a devise of lands to a corporation directly, is void or not under the statute of wills, and if void, whether such a devise can be sustained in equity

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The questions.

in virtue of the general powers and jurisdiction of the court of chancery in cases of trust, do not become material.

The questions presented by the case, as I view it, are, *first*, whether the testator (Philip Jacobs) devised the real estate in question to the corporation directly; or to his executors, subject to the trusts mentioned in the will; *second*, whether the devise to trustees for the use of the respondents, is a valid devise, under which they can take as *cestuis que us*; and *third*, whether the use is executed by the statute of uses, and if so, the effect.

To carry into effect the intention of the testator, is a cardinal rule in the construction of wills; and to do so, it is necessary to give effect to every part of the instrument, if possible.

The devise.

The testator devises all the rest, residue and remainder of his estate real and personal, (which includes the premises in question,) to The Orphan Asylum Society, to be applied to the charitable purposes, for which the association was established; to take effect immediately after the payment of debts and legacies, if he should leave no child; but if he should leave a child, then to take effect upon the death, intermarriage, or attaining of age of such child.

This, it is contended, is a direct devise to the respondents of the real estate in question; and, standing alone, it would undoubtedly be susceptible of no other construction; but he proceeds to devise all his real estate to his executors, subject to the trust aforesaid; and declares his will to be, that whenever such child should attain the age of twenty-one years, or marry, his real estate should be sold by his executors, and one half the proceeds paid to such child.

The testator had a posthumous child, which died at about the age of two years. Had that child lived and attained to the age of twenty-one years, no doubt can be entertained of the intention of the testator, that it should then be entitled to a moiety of the proceeds of the real estate, which was to be sold by the executors. But such a provision is in hostility to the previous devise to the respondents, to take effect upon the coming of age of the child. Upon the hap-

happening of that event by the *first* clause, the estate was to vest in the corporation, and by the subsequent one, to be sold by the executors, and one half the proceeds paid to the child. If, therefore, the first devise is to be carried into effect according to its terms, the latter provision is entirely without effect.

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To give effect to every part of the will, it seems to have been the obvious intention of the testator, if he should leave a child, to devise the real estate to his executors in trust for the society, if such child should die under age and unmarried; if not, then upon the maturity or marriage of the child, to be sold, and the proceeds divided between the society and such child.

The executors, then, took the estate at the death of the testator, subject to these trusts; and the question arises whether, at the death of the child under age and unmarried, the real estate was, *by the terms of the will*, to vest in the corporation.

Whether by its terms the real estate was to vest in the corporation on the death of the child.

It has been said upon the argument, that if the executors took the estate as trustees, they can only be divested of that trust by their own grant, or by operation of the statute of uses; but I can perceive no objection (provided the terms of the will require it,) to their holding the estate in trust, until the happening of an event such as the death of this child; and then that the fee should vest in other persons, by way of executory devise. Was it then the intention of the testator, upon the happening of this contingency, that the fee should vest in the corporation, or continue in the trustees for their benefit? The latter appears to me to be the fair construction of the will.

In one paragraph he devises, after payment of debts and legacies, "all the rest, residue, and remainder of his estate *real and personal*, to the respondents, to take effect upon the death of this child; and in the next he devises his *real estate* to his executors, subject to the trust aforesaid. It was a use, therefore, or beneficial interest, which I suppose he intended to devise to the respondents, leaving the fee in the hands of the trustees.

Whether the real estate was to continue in the trustees for the benefit of the corporation.

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If, as I have endeavored to show, it was not the intention

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of the testator to devise the estate directly to the respondents upon the coming of age of his child, it is a strong argument to prove that such was not his intention in case of the death of such child; for both contingencies are coupled in the same paragraph, and there is no limitation to the trust created in either case.

Whether the
corporation
can take the
use.

The next and more important question is, whether the corporation can take the use under this will, notwithstanding the provisions of our statute of wills. This statute enacts that any person having any estate of inheritance in any lands, tenements or hereditaments, may give or devise the same, or any rent or profit out of the same, to any person or persons, (*except bodies politic and corporate,*) by his last will and testament, or by any other act by him lawfully executed; and it is contended, that if a devise to a corporation directly would be void, a devise of the use is also void.

The right to
devise depends
on statute.

Although in England, under the Saxons, lands were devisable by will at common law, yet at the Conquest, and upon the introduction of the feudal system, the common law underwent a complete change in this respect; and an estate in fee simple in lands was no longer devisable. It became inconsistent with the nature of that system, that a tenant should have an unlimited power to devise his lands; for the reason that he might devise to persons incapable of performing feudal services. The power of alienation by devise, (except of a chattel interest,) in England, then, to be traced to the statutes of wills of the 32 Hen. 8, ch. 1, and 34 Hen. 8, ch. 5.

Our statute of wills is a transcript of these, with the additional enumeration of rents and profits. It is contended that the terms rents and profits mentioned in the statute, are intended to describe a use, and that as the lands cannot, so the use also cannot, be devised to a corporation under this statute.

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*I apprehend, however, there is a material difference between rents and profits, and that which has long been known under the denomination of a use.

Words *rents*
and *profits*, in
our statute of
wills, do not
include a use.

Rents and profits are incorporeal hereditaments; but a use is not. A use is said to be neither *jus in re* nor *ad rem*,

neither right, title nor interest in law, but a species of property unknown to the common law, and owing its existence to the equitable jurisdiction of chancery, resting upon confidence in the person and privity of estate : a thing collateral to the land, and only annexed to a particular estate in it, not to the mere possession ; so that when the estate to which the use is annexed is destroyed, the use itself is destroyed, as by disseisin, or the entry of tenant by the curtesy or in dower. It was rather a hold upon the conscience of the feoffee to uses, than a lien upon, or interest in the land ; and the principle upon which it was founded was, that the feoffee was bound in conscience to follow the direction of the feoffor. (See Cruis. Dig. tit. 11, ch. 2.) A thing so subtle, and cognizable only in courts of equity, which act upon the conscience, differs essentially from an incorporeal hereditament, which is of legal cognizance. Indeed, incorporeal hereditaments, such as rents, advowsons, &c., were the subject of conveyance to uses.

If, then, a use is not comprehended in the terms of the statute, the argument rests upon the ground that if a devise of land to the corporation would have been invalid, the devise of the use is equally so.

It might perhaps be conceded, that if corporations were prohibited by statute from taking the fee by devise, (which by the by, is not the case,) the law would not allow them to take the use. But the history of the English law furnishes at least a plausible argument against such a proposition.

Corporations were prohibited by several statutes of mortmain from holding lands ; yet it was deemed necessary to enact the statute of 15 Rich. 2, ch. 5, declaring uses subject to the statutes of mortmain. (Chudleigh's case, 1 Rep. 120.)

But the statute of wills is an enabling statute, and not prohibitory. Before this statute, individuals had no capacity *to devise lands ; but this enabled them to do so, except to corporations. In conferring the capacity to devise, the legislature withheld the capacity to devise to a corporation ; and for what reason ?

Before the statute of wills, corporations were prohibited

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Statute of wills is an enabling, not a prohibitory statute.

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Reasons why
devises to corporations were
excepted.

by the mortmain acts from taking or holding lands, or uses arising from them. The exception therefore, in the statute of wills, could not have been introduced for the purpose of prohibiting corporations from taking by devise, for they were already prohibited from taking in any mode; but was to guard against enabling them to take by devise. Without the exception in the statute of wills in England they would have been enabled to take by devise, when the mortmain acts would have prohibited their taking in any other way.

The history of the statute, I think, fortifies this view of it. In the first statute of wills, (32 Hen., 8, ch. 1,) corporations were not excepted, and were therefore enabled to take by devise in common with other persons, contrary to the policy of the statutes of mortmain; but two years afterwards the parliament, finding the mortmain acts so far repealed by the statute of wills, passed a new statute, (34 Hen. 8, ch. 5,) not prohibiting corporations in terms from taking under the statute of wills, but entitled, "an act for the explanation of the statute of wills," in which they re-enact the provisions of the first statute of wills, and introduce the exception as to corporations; not, therefore, expressly prohibiting corporations from taking, but qualifying the capacity to devise. The intention seems to have been to rely upon the mortmain laws, to keep property from corporations and to qualify the statute of wills so as not to interfere with those prohibitory acts.

Difference between an incapacity to devise, and a prohibition to take.

The distinction is a wide one between an incapacity to devise and a prohibition against taking; for although there may be an incapacity to devise directly to a corporation, yet such incapacity will not prevent the corporation from taking by grant from the devisee in trust, if there is no prohibition against their taking. So, too, there be an incapacity to devise *lands* to a corporation, and yet the corporation may take a use. But in either case, if prohibited from taking, the law would not probably allow that to be indirectly done which was directly prohibited.

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Incapacity to devise land will not prevent the devise of a use.

If, then, there is no other reason arising from the statute of wills why corporations may not take land by devise, except the want of capacity in the devisor to convey, there

would seem to be no objection in this case against the corporation's taking as *cestui que use*; for a devisor has capacity to devise a use; and this corporation is not prohibited from taking and holding either land itself or a use. All the English mortmain acts, including the 15th Rich. 2, are repealed by our statutes.

And if corporations cannot take by devise, merely for want of capacity to take in that particular way, the cases of a conveyance from a wife to her husband through the intervention of a trustee, and of a tenant in tail to a purchaser by means of a common recovery, seem to be conclusive to show that an indirect mode of conveyance is no fraud upon the law when resorted to only to remedy a want of capacity to convey directly.

But it is contended, that inasmuch as our legislature saw fit to repeal the English mortmain acts, including the statute of 9 Geo. 2, ch. 36, which prohibited all charitable bequests unless made and enrolled one year previous to the death of the donor, the policy of retaining the exception in the statute of wills, was to prevent impositions upon persons *in extremis* who might easily be persuaded to dispose of property to ecclesiastical incorporations for charitable uses, after it should no longer be of use to themselves.

Such an object, however, would not seem to comport with the policy of the legislature, who neither saw fit to prohibit corporations from holding lands, nor to impose the restraints of the statute of 9 Geo. 2.

If the policy was to prevent impositions, why was not the exception in the statute aimed at devises for religious or charitable purposes, instead of devises to corporations generally? There surely is no danger of persons making improvident devises to monied or manufacturing corporations.

*The English statutes, which the legislature were re-enacting, furnished every variety of prohibition against improvident devises, much better calculated to effect the object than any general prohibition of devises to corporations. They guarded against improvident devises, whether to individuals or corporations, for religious, superstitious or charitable uses.

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If corporations want capacity to take in one form, it does not follow that they may not in some other.

Object of the exception in the statute of wills was not to protect persons *in extremis*.

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Whether a
corporation
may take a use
or trust by devise

If it is shown that the exception in the statute of wills is to be regarded not as a prohibition against the taking of lands by a corporation, but as a qualification of the capacity to devise, created by that statute, the opinion pronounced in the court of chancery in this cause, contains another view of the subject which appears to my mind perfectly conclusive. It is, that before the statute of wills, when persons were not capacitated to take lands by devise, they might nevertheless take the use in that way; and, therefore, that since the statute of wills, although corporations cannot take lands by devise, yet they may take the use, there being no prohibition.

Corporations, since the statute of wills, stand in the same situation as to taking lands by devise, as all natural persons stood in before that statute. If, therefore, a use was devisable before the statute, a corporation may take a use by devise since the statute, especially if it be such as is not executed by the statute of uses.

History of
uses and trusts.

It is said by Cruise that uses were devisable, though lands were not; and persons, by that means, acquired a disposition of property for the benefit of their families, which they had not otherwise. They were the invention of ecclesiastics to evade the statutes of mortmain. And after the 15th Rich. 2, ch. 5, which subjected them to the statutes of mortmain, the practice of conveying to uses was continued, as the most effectual mode of evading the hardships of the feudal tenures, and of securing estates from forfeiture for treason. They became general, and were applied to purposes inconsistent with the policy of the government. Feoffments were made secretly; so that persons who had to sue, found it difficult to ascertain the right tenant against whom to bring their *præcipe*. Widows were deprived of their dower, husbands of their curtesy, purchasers and creditors were defrauded, the king and other lords lost their profits, fines, &c., and obscurity and confusion of titles prevailed.

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During the long and bitter contest between the houses of York and Lancaster, most of the lands in England are said to have been conveyed to uses. As these evils came

to be felt, the parliament attempted, from time to time, to apply a remedy. By the 50th Ed. 3, feoffments to the use of the feoffor were made liable to execution creditors; by the 1st Rich. 3, ch. 1, all conveyances by *cestui que use* were made valid; by the 1st Hen. 7, ch. 1, a formedon was given against *cestui que use*; by the 4th Hen. 7, ch. 17, lords were entitled to wardship of the *cestui que use*; by the 19th Hen. 7, ch. 15, further relief was extended to creditors; by the 23d Hen. 8, superstitious uses were suppressed; and, finally, by the statute of uses, 27 Hen. 8, ch. 10, after reciting all these mischiefs, the legislature declared that possession shall be annexed to the use.

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The object of the crown was to re-assert its rights of wardship, and other feudal profits out of the lands of the nobility; and the intention of parliament was to abolish uses by changing them into legal estates, and subjecting them to the rules of common law tenures.

The construction of this act, however, in a great measure defeated the intention of the legislature. Transferring the possession to the use by this statute gave rise to a mode of conveyance, by this means, which, on account of its convenience, by dispensing with the ceremony of livery, soon came into general use; so that uses, instead of being suppressed, were resorted to as the common and most simple mode of conveyance. And it being determined that all uses were not executed by that statute, its operation was circumscribed; and a large class of uses were left untouched, and have continued to this day under the denomination of trusts, constituting one of the principal branches of equity jurisdiction.

It was said by Lord Hardwicke, (1 Atk. 591,) that this statute, made upon great consideration, introduced in a solemn and pompous manner, by its strict construction has had no other effect than to add at most three words to a conveyance.

*Before the statute of uses, we have seen they were devisable to natural persons, although there was then no statute of wills nor any common law capacity to devise.

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Effect upon
this case of
the doctrine
that the statute
of uses
changed the
use into land.

The operation of the statute upon uses, is said to have been by turning the use into land, to render it not devisable in the same manner as the land itself. (2 Black. Com. 375.) This is the language of the elementary writers ; and during the short period of time between the statute of uses and the subsequent statute of wills, (a period of only five years,) I have not been able to find any case, and few, if any, could have arisen, going to sustain, impeach, or explain the proposition.

If it is meant that during this period a *cestui que use*, under a feoffment or other conveyance, was, by force of the statute of uses, to be regarded as the owner of the land so far as to incapacitate him to devise such use, he having no capacity to devise land, I perceive no objection to the proposition.

But to render the doctrine applicable to this case, it must go farther, and be held to mean that a use created by will is converted into land by the statute, and therefore was not devisable.

One of the things necessary to the execution of a use by the statute is "*a use in esse*;" and it seems to be difficult to conceive how the statute can operate upon a use until it shall be raised, and in existence ; and if a use was raised in this case, it can only be in virtue of a capacity to devise such an interest. There being, then, a capacity to devise the use, the operation of the statute upon it, if it is such a use as could be executed by the statute, it appears to me could be no other than by annexing the possession to the use, to vest the estate in the devisees, who would take, not as devisee, but under the statute of uses. And there would seem to be no objection to the execution of the use in this case, if the position is correct that the corporation are not prohibited from taking, whatever may be the objection as to the capacity of the testator to devise to it directly ; for it has been held in the case of a feoffment by the husband to A, for the use of his wife, that such a use *is executed by the statute, notwithstanding the husband had no capacity to convey directly to his wife. (Cruis. Dig. tit. 11, ch. 3, s. 28.)

It has been held that a feoffment by the husband to A, for the use of his wife, is executed by the statute though the husband could not con-

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vey directly to his wife. Whether the use in this case was within the statute.

But all the reasoning arising from the statute of uses, is answered, if the use in this case is such as could not be executed by that statute; for clearly, in such case, it could have no operation to destroy the capacity to devise.

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The question then arises, whether the use in this case is within the statute; and the examination of it necessarily casts us back upon the will, to seek for the intention of the testator. He devises the estate to trustees, in trust for the Orphan Asylum Society, to be applied to the charitable purposes for which the association was established. His object was not to benefit the society; but through it, to apply the estate to the charitable purposes for which the society was organized. The society itself is a trustee; and has a trust to perform, which a court of equity would undoubtedly enforce. It is a devise to trustees for the use of the society, as trustees for certain charitable purposes.

Suppose the corporation to be dissolved by the expiration of its charter; it never could have been the intention of the testator that these funds should be diverted from the charitable purposes to which he devoted them; and a court of equity never would permit it. If the corporation should, by dissolution or otherwise, become incompetent to execute the trust, I see nothing to distinguish the case from that of the ordinary one of a failure of the trustee, in which the court would act by the appointment of another.

On failure of a trustee, a court of equity will appoint another.

Again, suppose the powers of the corporation to be enlarged by a statute authorizing it to do banking or insurance business, in addition to the charitable operations for which it was first incorporated; will it be contended that it was the intention of the testator, that these funds should be used, or that the law would permit them to be used in such banking or insurance operations, instead of being applied to the charitable purposes designated in the will? I apprehend not.

If it is granted, then, that the corporation itself had a trust to execute under this will, it is a case not within the statute of uses; for that statute can only execute the first use, which, in this case, would vest the estate in the cor-

The statute will not execute a use upon a use.

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poration, unincumbered by any trust for charitable purposes, and contrary to the plain intention of the testator.

A trust is a use not executed by the statute; and the author of the Touchstone remarks, (p. 507, n. (1),) that "one of the modes of creating a trust, is said to be where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use.

Conclusions;
that the devise
was not direct
to the corpora-
tion:

The conclusions which follow my view of the case are, that the devise of the real estate in question, was not to the corporation directly, but to the executors for the use of the corporation upon the contingency which has happened, to be appropriated to certain charitable purposes:

That under
the statute of
wills there is a
mere incapacity,
not a prohibition
in corporations to
take:

That under the statute of wills, there is a mere *incapacity* in corporations to take lands by devise, and not a prohibition against their taking:

That a use
was devisable
at common
law, and therefore
a corporation
may take a use
by devise. That
the use in this
case is not such
as could be
executed by the
statute, or if it
could, yet it
would vest.

That a use was devisable at common law before the statute of wills; and therefore that this corporation may take a use by devise, not being prohibited by statute from taking either a use or the land itself:

That the use in this case is not such as could be executed by the statute of uses; or if it is, that the operation of the statute would not invalidate the devise, but vest the estate in the corporation.

If these propositions are established, it follows that the respondents are entitled to the estate in question; and that the decree of the court of chancery is, at least, substantially correct.

Decree therefore correct.

For reversal,
12.

For affirm-
ance, 7.

BURROWS, GARDINER, HAIGHT MCCALL and SMITH, senators, *concurred*, that the decree should be affirmed.

Decree of reversal as to the real estate

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*LOTT and wife, appellants,
against

ROOSEVELT, respondent.

Whether it belongs exclusively to the court of chancery, to determine whether an appeal to the court of errors shall stay the proceedings in the court below? *Quere.*

Whether the 28th rule of the court of errors of April 16th, 1827, shall be construed to adopt the standing orders of practice in the house of lords, on appeals? *Quere.*

The court of errors can, in general, make no order in a cause on appeal to that court, till there be a return to the appeal.

Whether that court will at any stage of a cause, determine on the effect of an appeal as to staying proceedings in the court below? *Quere.*

Semb. The court of chancery has at least a concurrent power with the court of errors to determine whether an appeal shall stay proceedings or not.

But the effect of an appeal is now regulated, in most respects, by the new revised statutes, for a more particular reference to which, and for the practice of the English court of exchequer, vid. note (c) to this case.

THE court of chancery having made a decree in this cause in favor of the respondent, which he insisted was an interlocutory decree, the appellants, thinking it a final decree, waited more than fifteen days, (the time limited for appeals from interlocutory decrees,) and then filed their appeal to this court with the assistant register of the court of chancery, making the proper deposit. The appeal was regular, and it was in due season, if the decree had been a final one. The respondent disregarded the appeal as inoperative; and proceeded in the cause in the court of chancery. The appellants, thereupon petitioned the court of chancery for a stay of proceedings, which was granted, until the further order of that court, without prejudice to the question whether the appeal should have been filed within fifteen days.

J. I. Roosevelt, for the respondent, now moved for leave to proceed in the court of chancery; and was proceeding to show that the decree was interlocutory in its character, when

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SUTHERLAND, J. inquired whether there had been any return to this court upon the appeal?

*Roosevelt answering in the negative.

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SUTHERLAND, J. expressed his doubts whether this court could entertain jurisdiction of the question. Besides, his impression was, that the question properly belonged to the court below, who had a discretion.

SAVAGE, Ch. J. said he thought neither the decree, nor order of the court of chancery staying the proceedings could properly be examined by this court, till they came here on the appeal.

JONES, Chancellor, said he should have been gratified, if the order to stay made by him in the court below, had taken such a direction as to have been now passed upon by this court; but he had the same doubts expressed by the judges, whether that could be until the matter was here upon the appeal. He thought that the respondent, before bringing up this question, should at least have taken measures to compel a return upon the appeal. He regretted that the question could not be now decided; for it had been an embarrassing one to him in the court below; and hence the order to stay which he had made was temporary, and with a view that the subject might be considered here. The question related to the place of, and the course to be pursued in the examination and decision upon the effect of an appeal as to staying proceedings. The question had been before the house of lords in England. One difficulty there seemed to be, whether it should be determined by that court or the court of chancery; another, whether the respondent might proceed of course, and put the appellant to move for an order to stay; or whether it lay with the respondent to apply, and obtain leave to proceed. In 1807 or 1808, a standing rule of the house of lords adopted the former course. In a late case wherein one of the circuit judges sat for him, the chancellor, the 28th rule of this

court, of April 16th, 1827, (a) was produced, which adopts the practice of the house of lords, as to cases not specifically provided for in the rules of this court; and the judge thought the standing order mentioned was comprehended "by that rule. It is an inquiry of some importance whether this be so. He, the chancellor, had his own views on the subject. He thought the question belonged to the court of chancery, as the late chancellor Kent had holden; (b) and that that court had a discretion, to be exercised on motion of the respondent, or otherwise, as that court should direct. He should have proceeded upon this view of the case; but felt himself embarrassed by the decision of the circuit judge, who sat for him, in a cause in which he, the chancellor, had formerly been concerned as counsel.

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SPENCER, Senator, rose to move that the motion be denied. He thought it could not be passed upon by this court at any stage of the cause. If the appeal were returned, the court might hear a motion to quash it. But he did not think this court could direct the court below as to the effect of an appeal upon its proceedings. This seemed more properly an act of legislation; and still some statute on the subject, he thought the court below should proceed upon its discretion, as the supreme court does in determining the effect of a writ of error. He did not believe that the rule of this court adopted the standing order of the house of lords. The words are "that in cases not already provided for, *the practice of this court* shall be similar to the practice of the court of exchequer chamber in England, and that on appeals it shall be conformable to that of the house of lords in England when sitting as a court of appeals."

This he thought related to the ordinary practice of that court; not to any peculiar forms of proceedings recently created by a general rule.

JONES, Chancellor, said the house of lords had occasion-

(a) Ante, 293.

(b) Vid. *Missionier v. Kauman*, (3 John. Ch. Rep. 66,) and the cases cited for that case; and the order of the house of lords there cited.

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ally interfered upon this question. But he concurred in the motion of the honorable senator, on the ground that the present application was premature. He added that he felt his own views so much strengthened by what had fallen from the judges and the honorable senator, that he should no longer *hesitate to act upon the question in the court of chancery, as a matter proper for the discretion of that court.

Motion denied. (c)

(c) In *Dewes v. Morgan*, (5 Price, 468, A. D. 1818,) in the exchequer, notice was given by the defendant that he intended to appeal to the lords, from certain orders; and

Danucoy & Raithby moved the court below, that all proceedings stay till the appeal should be heard.

The Solicitor-General & Blake opposed the motion, on the ground that it should have been made to the lords; and cited *Huguenin v. Basely*, (15 Ves. 180.)

GRAHAM, Baron. I have considerable doubt about the propriety of the present application to us; for I accede entirely to the opinion expressed by the chancellor in *Huguenin v. Basely*, that it is, at least, much more expedient that such an application should be made to the house of lords; and for the unanswerable reason given by his lordship, that such application, if encouraged, would paralyze the arm of justice. In subsequent cases too, the house of lords has been declared to be the proper court to which to apply on similar occasions; (*Waldo v. Caley*, 16 Ves. 206; *Willan v. Willan*, id. 69, 216;) and that an appeal lodged does not, *ipso facto*, stay the proceedings.

WOOD, Baron. This court has, most undoubtedly, authority to suspend its own proceedings at any time, and the practice of appeals proves it; for if it were bound by its orders, the right of appeal would, in many instances, be altogether taken away. Writs of error from courts of law are writs of right, and when they have been sued out and bail put in, they suspend the proceedings, *ipso facto, et ex debito justitiæ*. It used to be the same in appeals from courts of equity, until the general order of the house of lords was made for the purpose of altering the practice in that respect, in 1807. (15 Ves. 184.) But notwithstanding that order, the court of chancery has held, that the proceedings may be stayed on special application for that purpose, and that such an application may be made to either the court below, or to the court of appeal; although the chancellor observes, in the case of *Huguenin v. Basely*, that it is more expedient that the application should be made to the house of lords if it can.

Order to stay till further order.

But now as to the state of New York, the effect of an appeal from the

*JOHN CLAPP & OWNERS UNKNOWN, plaintiffs in error,
against
 WILLIAM & THOMAS BROMAGHAM, and JEMIMA MARTIN,
 defendants in error. (a)

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In a proceeding by petition for partition, under the statute (sess. 36, ch. 100, 1 R. L. 107,) alleging a seisin in common by the petitioners and the defendant, he pleaded sole seisin in himself, when the petition was presented, and always afterwards; traversing the seisin in common alleged in the petition. Replication, that the petitioners were seised in manner and form as stated in the petition. *Held* a material and proper issue in partition under the statute; and that it was incumbent on the petitioners at the trial, to prove that they were seised in common, at the time of presenting the petition, within the meaning of the issue.

It seems that, in a proceeding for partition, the plaintiff or petitioner must, allege that he is seised; and show a present actual possession; and that a mere right of entry will not satisfy the averment; and that, consequently, a subsisting adverse possession of the defendant, though short of 20 years, is a bar.

It seems that a disseisin or an adverse possession, though they may, in some respects, differ in meaning, will either of them, as between tenants in common, destroy their common possession, and thus bar a suit for partition between them; and either will, after 20 years, bar the entry of the tenant in common, who is out of possession.

But if adverse possession differ from disseisin in this: that the adverse possession of one tenant in common, will not divest the seisin of the other tenants in common till it tolls their entry; yet after it continues 20 years, thus tolling their entry and leaving them a mere right, it then destroys the common seisin, and so bars a writ of partition or a proceeding for partition under the statute, (sess. 36, ch. 100, 1 R. L. 507.) The co-tenants out of possession are thus put to their writ of right, to recover their share, and gain their seisin, before they can maintain partition.

court of chancery in respect to staying proceedings, seems, in the main, to be settled by the new revised statute, (Pt. 3, ch. 9, tit. 3, art. 3, § 80 to 89 inclusive.) By this statute certain securities or deposits are to stay proceedings in most cases, as on writs of error from the courts of law. In other cases the chancellor is to exercise a discretion. None appears, by that statute, to be given to the court of errors. The chancellor is to prescribe, by general rule, the effect which an appeal from a vice chancellor shall have in staying proceedings. (N. R. L. pt. 3, ch. 1, tit. 2, art. 3, § 61.) And the present chancellor WALWORTH (1829) has carried this provision into effect by his 116th rule, adopting for the vice chancery, with a single exception, all the provisions, on this head, of the statute in respect to chancery, *mutatis mutandis*.

(a) Ante 304, S. C. on a question of amendment.

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A judgment in partition does not change the possession; but in an ejectment or writ of right, it would be conclusive between the parties.

On a bill for partition in chancery, possession of 20 years, adverse to the plaintiff, being interposed; the cause must stand over for a trial of the title at law. *Per Jones, Chancellor, delivering the opinion of the court.*

Whether there be an adverse possession, is a question of fact for the jury; but the trial of such possession, often involves questions of law which the court is to decide; and in such case, the judge should submit the question of fact to the jury, with his directions as to the law involved with the evidence.

A verdict cannot be reversed, on error, as being against the weight of evidence; but it will be reversed for a wrong direction of the court to the jury, on a question of law or the legal result of the evidence.

When in a proceeding in partition under the statute, (sec. 36, ch. 180, 1 B. L. 507,) there is evidence of a possession 20 years before suit, adverse to the petitioner, the jury should be instructed that, if they find such adverse possession proved to their satisfaction, they should render their verdict for the defendant.

Verdict. A possession may be adverse, though by one claiming it under an executory agreement; and thus *Jackson v. Johnson*, (5 Cowen, 74,) contravenes, therefore, is overruled.

Though where a tenant in common enters and takes exclusive possession generally, he shall be presumed in as a tenant in common; (1 Dig. 44;) yet when he enters adversely, claiming in severalty, the statute of limitations runs in his favor and against his co-tenants.

Disseisin, in law, always meant, in substance, the divesting of the owner of his seisin and possession, and substituting the ownership and possession of the disseisor. *Per Jones, Chancellor, delivering the opinion of the court.*

Disseisin, at this day, means an entry and claiming as one's own, with or without color of right, and keeping out, and setting at defiance, the former possessor and all others. Actual force is not necessary. *Per Jones, Chancellor, delivering the opinion of the court.*

An abatement is equivalent to a disseisin in respect to constituting an adverse possession.

Though one enter as the committee of a lunatic, a subsequent sale to another by such committee, and claim of the title by the purchaser absolutely changes the character of the possession, and makes it adverse.

Tenant *per autre vie*, holding 20 years adversely after the death of cestui que vie, bars the remaindermen or reversioner. *Per Jones, Chancellor, on the authority of Lord Mansfield, in Doe v. Prosser, (Cowp. 319, and vide Jackson v. Halsey, 9 Cowen, 323.)*

The possession of a tenant in common, *ex nomine*, will never bar his companion. *Per Jones, Chancellor, on the authority of Lord Mansfield, in Doe v. Prosser, (Cowp. 319.)*

Various acts by a tenant in common, which may constitute him a possessor adverse to his co-tenants, enumerated upon authority. *Per Jones, Chancellor, delivering the opinion of the court.*

The entry of one of several heirs, claiming the whole, and denying possession

to his co-heirs, and selling the land to a stranger, constitutes a possession adverse to the co-heirs; and being continued 20 years, bars their right of entry.

Possession under claim of title, with or without a valid deed, is adverse.

It seems that an adverse possession, taken in fraud of the true owner, shall not avail to bar his right of entry, though continued 20 years.

But mere neglect to inquire into a title by the purchaser, is not a fraud upon the owner. Nor should notice of a defect in the title be imputed to a purchaser *because he is negligent, so as to preclude him the benefit of the statute of limitations.

Though the title of an adverse possessor be clearly defective; yet the true owner must sue within 20 years, or he is barred his entry.

The rule that what is sufficient to put a party on inquiry, shall operate as notice to him, does not apply to a purchaser who claims under the statute of limitations. Clear and positive proof is, in such case, necessary, of notice that the title supposed to be acquired is bad, accompanied with proof of an intent to defraud the real owner.

Saisin, when averred in pleading, means *saisin in fact*. Per JONES, Chancellor, delivering the opinion of the court.

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On error from the supreme court. This cause was reported, as decided on the case subject to the opinion of the supreme court, in 5 Cowen's Rep. 295. Several points raised below, as mentioned in the former report, were not passed upon by the court. The case having been, pursuant to stipulation, turned into a bill of exceptions, all the points raised below were now argued again here; and it will be perceived, more of them were now passed upon than the supreme court thought it necessary to consider. The case must, therefore, be restated more extensively than before.

The proceeding in the supreme court was by petition presented (August 16th, 1823,) to that court, in behalf of the two Bromaghams, William and Thomas, and Jemima Martin, in pursuance of the act for the partition of lands, passed April 12th, 1813, (1 R. L. 507,) praying for the partition of a farm of 196 acres Schodack, Rensselaer county, of which the petitioners claimed to be seised in fee as tenants in common, each of one undivided ninth part. The petition alleged that John Clapp was tenant in common of another undivided ninth part, which he purchased of Peter Bromagham; and averred ignorance in the petitioners, of the

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other owners. The petition was served on Clapp, May 10th, 1823. After the petitioners had published notice, as required by the statute, in the case of unknown owners, *to wit* in August term, 1823, one of the defendants below, John Clapp (the now plaintiff in error) appeared and pleaded as follows: "And the said John Clapp defends the wrong and injury, when, &c., and prays judgment, if the said petitioners ought to have or maintain their petition aforesaid, for partition of the lot of land as described in their said petition; because he says that he, at the time of preferring the said petition, was and ever since has been, and now is, sole seised and possessed thereof in his *demesne* as of fee; *without that*, that the said petitioners, or either of them, was or are seised of any part thereof, as tenants in common, as in their said petition they have alleged;" concluding with a verification. To this plea the defendant below annexed a notice, that he would give in evidence on the trial, "that the petitioners aforesaid never were seised of the premises in the said petition described; but, on the contrary, that the said defendant, at the time of exhibiting the said petition, was and still is the sole owner of the said above described premises; and at the time aforesaid, was seised of the said premises in his *demesne* as of fee; and had been so seised for 25 years previous to the exhibiting of the petition aforesaid, adversely to the claims of the said petitioners, and of all other persons whatsoever." The petitioners, protesting that Clapp, the defendant below, was not at the time of preferring the petition, nor ever since had been, nor then was sole seised, &c., for replication to his plea, said, "That the said petitioners are seised of the said premises, as tenants in common, in manner and form as the said petitioners have above in their petition alleged; and this, &c." tendering an issue to the contrary.

The cause was tried at the Rensselaer circuit July 1st, 1824, before BERRS, (late) C. Judge.

At the trial, it was admitted by the defendant below, that William Bromagham, under whom the petitioners claimed as his heirs at law, died on the 15th day of January, 1799.

The petitioners then called James Harrington as a wit-

ness, who testified that he knew William Bromagham, the father of the petitioners, who died on the farm in question, which he had possessed ever since the revolutionary war broke out, leaving nine children, including the petitioners ; also Eleanor, Francis, Peter, Abraham, Isaac and Richard ; that Eleanor and Abraham are dead, leaving children ; that the wife of William Bromagham, the ancestor, is dead, and that after her death, Peter and Isaac, two of William's (the ancestor's) children, supported the father on his farm, for about the first year after his wife's death ; that Isaac then left it, and Peter continued to support his father on the farm ; that at the death of the ancestor, Jemima, one of the petitioners, was a married woman, and her husband (one Morris Martin) alive when her father died. The witness thought Richard, another of the children, was then under 21 years of age ; did not remember where William, one of the petitioners, was, when his father died. Cross-examined, he said after Isaac went off, Peter occupied the farm, till he sold it to Clapp, the defendant below ; that four or five years before the ancestor's death, Peter and Isaac took the farm ; and after Isaac left it, Peter took care of his father on the farm till he died. Thomas went off about the time of his father's death ; and did not return to his knowledge, nor did the witness see him for 16 or 17 years. Timothy Phillips, a witness for the petitioners, said the ancestor lived on the farm as his own in 1784 ; that Jemima, one of the petitioners, lived at Sackendaga or Sandlake when her father died ; that Martin, her husband, died 13 or 14 years before the trial. That after Isaac left the farm before his father's death, William, one of the petitioners, worked the farm with him, Peter, as the witness supposed, under Peter ; who after his father's death, built a barn on the premises ; and his brother William went off and on for two seasons, being rather unsteady. Thomas, one of the petitioners, was at Sandlake when his father died, where he remained several years. William Lewis, a witness for the petitioners, said, that William, the ancestor, killed his wife in a fit of lunacy ; that Thomas then lived off the farm, but in a house on land adjoining the farm, part of

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which he worked ; that Peter and Isaac managed the farm after her death, Thomas continuing to occupy a part of it, and William continuing on it. After the mother's death, and before her husband's death, Peter agreed to let the witness sow some buckwheat on the farm. Thomas, one of the petitioners, forbade this ; but the witness sowed the grain notwithstanding. Thought William and Richard were on the farm when the ancestor died ; thought Richard was then under 21 years of age ; William he thought, above that age ; thought Thomas sowed and cropped a part of the farm after his father's death. *Cross-examined, he said there was a difficulty after the father's death ; Peter and Thomas both claiming the farm. On re-examination, he said, he understood from Peter and Isaac, that the children, or some of them, had agreed with Peter and Isaac that they two should support their father on the farm during his life, and have the use of the farm for that time ; and that they should afterwards buy out the other heirs if they could ; and that the court of chancery had given him (Peter) a right to take charge of the farm.

The defendant below then introduced an instrument in writing executed by Peter Bromagham and the defendant below, John Clapp, dated November 29th, 1802, as follows : " That the said Peter hath bargained and sold the farm he now lives on (the premises in question,) &c. for the consideration of £1000, &c. The said Peter is to pay the quarter sale in this bargain, and to deliver the farm clear of arrears of rent to the 1st of January, 1803. And it is further agreed that the said Peter is to deliver the possession of the said farm to the said John Clapp on or before the first day of May next ; and further, the said Peter is not to cut any green timber on said farm ; the said Peter is to leave on the farm half a ton of hay for the use of the said John Clapp ; and the said John Clapp is to pay the said Peter £600 of the above sum between the 1st of April or May next, and £200 in one year from the 1st day of May, 1803, without interest ; and the remaining sum of £200 to be paid in one year after, which will be in the year 1805, with interest. To the performance, the parties bound

themselves in 1000 dollars penalty; and signed and sealed. On this agreement, there was an endorsement, May 3d, 1803, of £300, in part of the first payment. The petitioners objected to this instrument as inadmissible; the objection was overruled, and the instrument read in evidence.

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The defendant below then called his son Daniel Clapp as a witness, who testified that the defendant below took possession of the farm, as the witness thought, the last week in March, 1803; that Peter left it about the latter part of April, and the defendant below has been in possession ever since, and occupied the farm exclusively as his own, except one half or three fourths of an acre, which he conveyed to Joseph Thompson: that the witness was present at the final settlement of the parties, when it appeared that the defendant below had paid for the farm in full, about \$2,500, then being, in the witness' judgment, the full value of the farm. Cross-examined, he stated, that the defendant below got an assignment of the farm from Peter endorsed on the back of the Patroon's lease of the farm in fee.

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The petitioners then proved notice to the defendant below to produce the lease in fee, which he declined doing. The witness did not recollect distinctly whether the assignment was given the same year or the year after the defendant below took possession; but he thought it was given the same year; and was dated the 3d or 5th of May. That the defendant below went from Dutchess county, where he resided, to Schodack early in the winter of 1802. On his return, said he had bought of Peter Bromagham; that the farm was leased land; that his father knew when he got the assignment from Peter Bromagham, that Isaac, who was on the farm at the time, was his (Peter's) brother. The petitioners objected to the declarations of the defendant below as evidence. The witness farther testified, that 15, 16 or 17 years before the trial, a declaration in ejectment was served on the defendant below for the farm in question, or part of it, at the suit of Thomas Bromagham; but knew not what became of the suit and had never heard of it since. The petitioners objected to this testimony, un-

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less the declaration or proceedings in ejectment were produced, or their non-production accounted for. The witness further stated, on cross-examination, that when the declaration in ejectment was served, Joseph Vickary and Peter Bromagham executed to the defendant below a bond of indemnity against all claims that should be made against him for the farm in question. The petitioners then proved a notice to produce this bond; and also an agreement in writing by which Peter and Isaac Bromagham, or either of them engaged to support their father; but the defendant below produced neither. The witness farther testified that he thought the bond was given in consequence of the ejectment being served. The petitioners admitted that the husband of Jemima Martin died 14 years before the trial.

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*The defendant below then called Joseph Kane as a witness, who testified that Peter was in possession of the farm in 1795, and continued so till he sold to Clapp. He remembered a suit for an alleged trespass on the farm 29 years before the trial between Peter and Thomas, in which Thomas succeeded; but the witness understood the judgment was afterwards reversed. This testimony was objected to by the petitioners, as being parol evidence. The witness also stated that Isaac was a witness before the justice, and testified that Peter was in possession of the farm, and had paid the taxes and the Patroon's rent. The petitioners also objected to this testimony, as Isaac was yet alive and competent to testify. The witness further testified, that when Clapp purchased, it was understood in the neighborhood and by the witness, that Peter was then the owner. The petitioners objected to this evidence. The witness farther testified, that he had resided near the farm since 1795; did not remember or believe, that Thomas was ever in possession of the farm after that time. William worked there one season, and made his home there; but did not occupy the farm. Cross-examined, he said the trial of the action of trespass was before William's the ancestor's death; the question tried he understood to be, who was the sole owner of the farm. After the ancestor's death, there were great quarrels and contentions between Peter and

Thomas. The defendant below, then called Henry Dubois as a witness, who said he had lived within a-half or three-quarters of a mile of the farm from 1787. That Peter lived on the farm from the time of his mother's death, and was in exclusive possession of it after Thomas left the clay house on Lewis' farm, and after the ancestor's death. That the ancestor's wife died in 1794, when Peter and Isaac took possession of the farm, saying each was to have half the products or benefits of the farm, and to support their father together. They occupied together about a year, when Isaac left; and from that time Peter occupied exclusively. They said, at the time, that one of them had bought out one of the younger brothers, and the other had bought out another. After the death of the mother, Thomas lived in the clay house, and *worked a part of the farm for one or two years; and then was turned out of possession, and went to Sandlake. Peter, after her death, said he had authority to take his father in charge as a lunatic. After Thomas went away, which was before his father's death, Peter had the sole and exclusive occupation of the farm, as much so as any other person had of his own farm in the neighborhood. The witness never heard Peter's title questioned till the ejectment suit, and the present suit. When Clapp bought, it was understood by the neighbors (the petitioners objected to this testimony) that Peter owned the farm. Witness, on cross-examination, was not certain but William sowed or planted a part of the farm after his father's death. On direct examination, he said he had heard Isaac Bromagham say that Peter owned the farm; that he had sold his half of the farm to Peter for \$100. The petitioners objected to this testimony. The witness said that in 1794, the farm, he should estimate, was worth 750 or 800 dollars; but lands there doubled in value within 5 or 8 years after. Lena Voorhees, a witness for the defendant below, stated that she lived in the neighborhood of the farm, when the defendant below made the purchase; that he arrived in the evening, and went with the witness' husband, (who told him the defendant below, that the farm belonged to Peter,) to bargain for it. The defendant below stayed th

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the town of Schedack. It was then understood in the neighborhood that Peter owned the farm, though rumored, and she thinks before the defendant below came, that Thomas claimed a right.

The petitioners then called Abraham Harrington as a witness, who estimated the farm at from 800 to 1000 dollars in value; said it was well stocked when the mother died; and he would have been willing to have supported the ancestor to the time of his death for the use of the farm so long; and would have given bonds to do so.

The defendant below, then, having released Peter Bromaghnam, called him as a witness, who said his mother died about 30 years ago; that, after her death, he and Isaac took possession of the farm, continued together between one and two years, and then he bought out Isaac. Shortly after his mother's death, it was agreed that the children should come together; and, accordingly, Eleanor and her husband Vandusen, Isaac, Abraham, William, Richard, Francis and Jemima and her husband, met at their father's house. Thomas refused to appear. That at the meeting a paper was drawn and signed by the children, except (he thought) the women. (The petitioners objected to any evidence of the paper without producing it or showing its loss.) The witness testified that the substance of the paper (though he did not produce it was, that Peter and Isaac were to support their father on the farm, and to pay his debts; and Peter and Isaac to have the farm when he died; that under that agreement, Isaac and the witness continued on the farm for one or two years; and then Isaac left it, the witness having given him \$100 for his share of the farm, while the father was alive. After this the witness and Isaac worked the farm on shares; but the witness held the farm as his own. Thomas then lived in the clay house; and afterwards threw down the fences on the farm, and committed other trespasses upon it. Two ejectments were served on Thomas; one in behalf of the witness, the other in behalf of Lewis; and Thomas was turned off the farm in question and Lewis' farm; (this testimony was objected to by the petitioners;) but that all this happened before the death of their father

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The witness, after Isaac left it, continued to occupy and hold the farm as his own exclusively, until he sold to Clapp, the defendant below; had paid debts of his father, but did not remember the amount; and paid the quarter sale under the contract with Clapp; and paid £40 13s. 7d. for William, one of the petitioners, about the year 1800, to V. S. Sprong, in consideration of which, William promised to give a receipt for all his claim upon the farm, which he refused to do afterwards; again promised to give the receipt, in consideration of two colts and a heifer, which he had of the witness; but again refused, and never has signed the receipt. The witness also stated how the most of his father's personal property, the whole valued at about \$100, was disposed of by distribution among the children and otherwise. Cross-examined, he said he was appointed the committee of his father, a lunatic, by the court of chancery; that the support of his father was worth two such farms as he had. Morris Martin, (the husband of Jemima, the petitioner,) said the witness was entitled to the farm for his trouble. The witness never accounted as committee. He held the farm under the agreement and the authority of the court of chancery. Did not remember telling Clapp, the defendant below, when he applied to purchase, that the witness had brothers or sisters, that the farm had belonged to his father, or that the witness was the guardian or committee of his father during his lunacy; did not show Clapp the title deeds till the witness assigned to him. The defendant below, called Timothy Philips, (sworn *ut supra* for the petitioners,) who said, on cross-examination by the petitioners, he had heard Peter say he had got the farm from the chancellor, and his brothers and sisters might help themselves if they could; and the witness thought it was so understood in the neighborhood. Thought the valuation of the lunatic's personal property at 100 dollars too low.

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The petitioners introduced in evidence the inquisition of the ancestor's, William Bromagham's lunacy, finding him a lunatic, dated May 12th, 1795. They then called Isaac Bromagham, who swore that the agreement between the children, spoken of by Peter Bromagham was, that after

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the father's death, the farm should be divided equally among the heirs. It was in writing and signed by Peter and the witness, who thought that others did not sign it. The witness continued on the farm, except eight months, till Peter sold it to Clapp, the defendant below, and was then on the farm, and present when Clapp proposed to purchase, and he knew the witness to be Peter's brother. Clapp lived in Dutchess county. Thomas uniformly claimed an ininterest in the farm, and often threatened a suit for its recovery. The witness understood from Peter, both when he was appointed committee and within a few days past, that he claimed the farm as having got it from the chancellor; and that he was to have \$300 a year for his father's support; and that the support of his father had eaten up the whole farm. He declared to the witness, a great number of times before he sold to Clapp, the defendant below, that he, Peter, claimed the farm as having got it from the *chancellor's appointment of him as a committee. Peter, before he sold to Clapp, told William and Mrs. Martin the same thing; and that Thomas would have no part of the farm, because his father had given him a farm in Pittstown. Francis, two years after his mother's death, went to Oswegatchie, and had been gone ever since. Abraham died leaving nine children, all under age except two. The family was at Fort Hunter. All Martin's children, six in number, were at Sandlake. Was decidedly of opinion that the use of the farm was sufficient for the trouble and care of keeping the lunatic, till the last year of his lunacy. After the father's death, Peter claimed the farm exclusively, and occupied it as his own till he sold to Clapp. The petitioners next called Peggy Bromagham, who testified that she had often heard William and Thomas, two of the petitioners, respectively say they would have their parts of the farm; but that Peter refused them their rights.

Considerable other testimony was given in respect to the comparative value of the farm, with the expense of keeping the ancestor, the value of the personal property of the ancestor, the claims set up by the petitioners, &c.;

but the above is an outline of the material evidence. There was also considerable discrepancy between the testimony of Peter and Isaac Bromagham, in respect to collateral facts.

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The counsel for the defendant below, insisted that his evidence furnished a complete defence, and called upon the judge so to charge the jury ; but the judge ruled otherwise ; and the counsel for the defendant below excepted. The parties then stipulated in writing that the jury should find for the plaintiff, subject to the opinion of the supreme court, with liberty to either party to turn the case into a bill of exceptions or special verdict ; all questions as to admissibility or competency of witnesses or questions arising on the case, to be reserved for the opinion of the court.

The cause was continued on the record in the supreme court, by *curia advisare vult*, to February term, 1826, when that court gave judgment, *quod partitio fiat*, for the petitioners, of three-ninths, according to their claim in the petition, "which was entered on the record accordingly. The judgment against the "owners unknown," was by default. The cause was then farther continued on the record, from term to term, to hear the report of the commissioners of partition, to August term, 1826 ; when an entry was made on the record, of a suggestion by William Bromagham and Jemima Martin, two of the petitioners, that their co-petitioner, Thomas Bromagham, had died on the 15th day of May, 1826, having first devised his interest in the farm in question to Jemima Martin and Isaac Bromagham ; and praying judgment upon the premises. The entry on the record was then of a judgment for the surviving petitioners and Isaac Bromagham, in lieu of the former judgment, viz. in favor of Isaac Bromagham for an undivided 18th part ; in favor of William Bromagham for two undivided 18th parts ; and in favor of Jemima Martin for three undivided 18th parts, of the premises in question ; and *quod partitio fiat* accordingly. The cause was then continued on the record to October term, 1820, when the report of partition by the commissioners was received and

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entered, and the supreme court gave judgment that the partition should stand confirmed; whereupon error was brought to this court.

The reasons for the original judgment *quod partitio fiat* were now rendered by the chief justice, as in 5 Cowen's Reports, 297, S. C.

James Edwards and *S. A. Foot*, for the plaintiffs in error, stated the following points, and cited the authorities respectively following those points, in their support :

1. The evidence detailed in the bill of exceptions established an adverse possession of 20 years against the rights of the petitioners ; and the judge at the circuit ought so to have instructed the jury ; and the supreme court ought to have decided on the case before them, that such a possession bars a suit for partition. (Co. Lit. s. 247, p. 167, a, and note, 16 Vin. 225. 5 Com. Dig. 165, 168, Am. ed. 14 Mass. Rep. 434, per Parker, Ch. J. 1 John. Cas. 36, 239. 6 John. Rep. 190. 2 Bac. Ab. 330, tit. Disseisin, Philad. ed. 3 Bl. Com. 167, 217, 285, 180, 187, 188, 191, 192, 194, 195, 196. 1 Burr. 60. 1 Taunt. 578, Preston *arguendo*. 1 John. Cas. 232. Anthon's N. P. 110, 113, note (a). 2 Cruis. Dig. 554. Cowp. *217, per Ld. Mansfield, Ch. J. Co. Lit. 380, b, and note (285). Adams on Ej. 55, 6. 7 Wheat. Rep. 59. 2 Harr. & McHenry, 254, and Cook *arguendo* there. 7 Mass. Rep. 475. 14 Mass. Rep. 484. Com. Dig. Pleader, (C. 35). Co. Lit. 17, a 1 R. L. 185. Story's Pl. 47, 8. 2 Dunl. Pr. 910 3 Saund. 45, a. 2 B. & P. 507. 2 Sel. Pr. 215, 226, 7 3 Reeves' Hist. E. L. 49. Booth on R. A. 383, 172, 244. 1 John. Ch. Rep. 111. 2 Atk. 380. 1 Dick. 299. 1 Ven. & Bea. 556, 7. 10 Wheat. Rep. 152. 3 P. Wms. 227. 2 John. Ch. Rep. 135. 1 Jac. & Walk. 473. Bal. on Lim. 9. 4 Bac. Abr. 461. 6 Com. Dig. 167, 168. 2 Bl. Com. 87, 88, 185, 189, 193. 8 John. Rep. 516. Co. Lit. 175, a. 3 John. Cas. 128. 17 John. Rep. 221. Co. Lit. 322, 323, 295, b. 300, a. 4 Com. Dig. 71. F. N. B. 206. 3 Com. Dig. 544.)

2. The facts established by the evidence authorize the presumption of releases from the petitioners. The circuit

judge should have directed the jury, on this ground, to find a verdict for the defendants below ; and the supreme court, for the same reason, should have given judgment for them on the case. (1 Cain. Cas. Err. 1, 2 Cain. Rep. 382, 10 John. Rep. 377, 475. 9 John. Rep. 169. 11 John. Rep. 446. 4 T. R. 682. 13 John. Rep. 513. 15 John. Rep. 89. 7 Wheat. Rep. 110. Cow. 214. 12 Ves. 251.)

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3. The supreme court erred in awarding Thomas Bromagham's interest in the premises to Jemima Martin and Isaac Bromagham ; as the devise under which they claimed was inoperative by reason of the adverse possession. (Pow. on Dev. 184, Rob. on Willa, 297. 11 Mod. 125. 8 East, 566. Cruis. Dig. tit. Devises, ch. 3, s. 25, 28. 10 Mass Rep. 131.)

J. L. Tillinghast & J. V. N. Yates, for the defendants in error, stated the following points ; and cited the authorities respectively following those points, in their support :

1. That partition is an action purely real, and not possessory ; and is, therefore, not barred, unless by an adverse possession of twenty-five years, excluding disabilities ; and no such adverse possession exists in this case. (6 Vin. Abr. 235, 6, 7, (S) pl. 16, (U) pl. 6. Lit. Rep. 300. Co. Lit. 239, a note (1). 3 Bl. Com. 117, 118. 2 Mass. Rep. 462. *2 Sell. Pr. 218. Noy, 68, 148. 2 Crompt. Pr. 300. 2 Dunl. Pr. 951. Wyche's Pr. 306. Archbold, 473. 3 Chit. 676. 10 Wentw. 151. Booth on R. A. 95, 244, 5. Lit. s. 478. Hob. Rep. 8. 5 John. Rep. 80. Dyer, 179. 2 Saund. 45, note (e). 16 Vin. Abr. 222, (E. 2.) Br. Partition, pl. 16, 21, 36, 15. 1 Com. Dig. 471, pl. 3. F. 1. F. N. B. 62, M. 1 Brownl. 156. Jacob's L. Dict. Partition. 16 Vin. Abr. 238. 17 John. Rep. 224. 8 John. Rep. 558. 2 Cain. Rep. 385. 1 id. 7. 2 id. 139. 2 Dual. 960, 961, 967. Story's Pl. 347. F. N. B. 19, B. 3 Com. Dig. Droit, (A.) (B. 1.) Co. Lit. 266, s. 158, b. 164. 6 Co. Rep. 3. 2 Saund. 45, note (e). 1 Com. Dig. Action, D. 2. F. N. B. 9, B. Co. Ent. 411. Cliff's Ent. 56.)

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2. Even if the action would be barred by an adverse

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possession of twenty years, yet such possession is negatived by the evidence, the plea and the verdict. (5 Cowen, 74, 90, 91, 92. 2 Bibb's Rep. 416. 12 Mass. Rep. 235. 1 Coxe, 171. 4 John. Rep. 230. 1 Cowen, 605. 9 John. Rep. 180. 4 Mass. Rep. 378.)

3. The question of adverse possession was for the jury, (and not the court to decide; and their verdict in this case which comes up by bill of exceptions,) cannot be reversed, on the allegation that it is against evidence. A bill of exceptions must not be on controverted facts, &c.; but the jury alone are to draw presumptions from facts. (2 Cain. Rep. 168; 9. 1 East, 568. 1 Burr. 397. 2 Cranch, 184. 12 John. Rep. 242, 357. 8 id. 495. 7 id. 5. 1 Cowp. 103, 217. 5 John. Rep. 467. 1 John. Cas. 289. 11 John. Rep. 446. 2 Bac. Abr. 529. Cowp. 217. 14 John. Rep. 304, 307. 1 East, 568. 9 John. Rep. 102, 174. 10 id. 334, 377, 380, 417, 475. 11 Wheat. 276, 199, 209, 59, 75. 2 Bay's Rep. 483. 2 Serg. & Rawle's Rep. 527.)

4. The circuit judge properly refused to declare the plaintiffs absolutely barred, from the evidence adduced on the trial; and the charge of the judge to the jury must be presumed to have been correct, as nothing appears to the contrary. The presumption insisted on was for the jury. On the doctrine of presumption the following cases were cited: 1 Cain. Rep. 84. 1 Cain. Cas. in Error, 1. 2 Cam. Rep. 382. 6 *John. Rep. 34, 133. 11 id. 91, 446. 4 T. R. 682, 468. 1 Phil. Ev. 123, 151, 155, 127, 129. 12 John. Rep. 242, 357. 13 id. 36, 7, 513. 19 id. 345. 3 Day, 289. 2 Cranch, 184. 1 Stark. Ev. 348, 34, 434, 438. 3 id. 1224, 1216, 1237, 1243, 1247, 1251. id. pt. 2, s. 16. Co. Lit. 164. 11 John. Rep. 91, 446, 517. 10 id. 338, 414, 417, 377. 16 id. 210. 1 B. & P. 338. 6 Bin. 419. 8 East, 348. 3 John. Rep. 226, 388, 424. 15 id. 479. 3 East, 192. 10 id. 216. Bull. N. P. 298. 3 Wils. 362. 2 Bl. Rep. 852. 3 Mass. Rep. 399. 10 id. 105. 5 Cranch, 262. 3 John. Cas. 118. 11 East, 478. 6 Ves. Jun. 184. 5 B. & A. 232. 2 id. 386. 6 East, 214. 2 Saund. 175, b 1 T. R. 141.

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5. "Owners unknown" cannot assign errors, unless they

disclose their names, and the quantity and quality of interest they claim.

6. Admitting error could be brought by Clapp in the name of such *owners unknown*, in the manner that has been done in this case; yet, having suffered judgment *by default* in the supreme court, they have been guilty of *laches*, and are now precluded from their remedy in this court. An objection not made, or if it be waived in the court below is not the ground of error. (15 John. Rep. 544, 518. 2 Cowen's Rep. 51.)

7. The devise under which Jemima Martin and Isaac Bromagham claim the share of their brother Thomas was valid in law. (2 Cain. Rep. 169. Palm. 205. Cro. Jac. 659. 1 Burr. Rep. 60. Co. Lit. 330, b. note 285. R. L. 514, 515. 1 John. Cas. 33. Co. Lit. 111. a. 15 Mass. Rep. 118.

8. Clapp's agreement with Peter Bromagham, if for any greater interest than Peter could lawfully grant, was in fraud of the other heirs, (he knowing the existence of such heirs;) and it was therefore void as to them. A purchaser by fraud cannot gain a title by the purchase, or by possession under it, however long. (10 John. Rep. 457, 462, 463. 3 id. 77. 2 Wheat. 29. 9 Wheat. 545. 11 id. 90. 2 Mass. Rep. 506. 2 Ves. Jun. 280. 1 Burr. 117, 118, 397, 474. 5 Cowen's Rep. 346, 350. 14 Mass. Rep. 296, 300. 4 John. Rep. 536. 14 id. 493. 1 Cruis. Dig. 541. 13 John. Rep. 537. 2 Ves. Sen. 156. 2 Sch. & Lef. 99, 487, 682, 689. 5 Day's Rep. *341, 345. 3 Atk. 654. 8 Cranch, 93. 15 John. Rep. 568, 669.) Clapp had notice of a better title when he purchased; and the effect of this is to make his purchase fraudulent. (3 Bibb's Rep. 509. Sugd. L. of Vend. 469, 499, 506, 547, 490. 1 Cowen's Rep. 622, 641, 644. 2 Mad. Ch. 225. 7 John. Ch. Rep. 68, 122. 1 Wash. Rep. 38. 1 Atk. Rep. 538. 2 Atk. Rep. 630. 3 id. 304. 2 Ves. Jun. 454. 1 Munf. Rep. 38. 1 John. Ch. Rep. 566, 302. 1 Fonbl. Eq. B. 2, Ch. 6, § 2, note (1); § 3, note (m); B. 3, ch. 3, § 1 note (b). 8 Wheat. Rep. 445, 447. Newl. on Contra. 511. 9 Wheat. 498, 499. 1 Hopk. Ch. Rep. 55. 13 Ves. 120. 12 John.

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Rep. 343, 345. 4 John. Ch. Rep. 38. Paw. on Powers, 111. 2 Ves. Jun. 440. 3 Con. Rep. 146. 4 Cowen's Rep. 722. 3 John. Ch. Rep. 345. 6 John. Ch. Rep. 110. 2 Cowen's Rep. 527, 544. 2 Sch. & Lef. 474. 1 id. 412. 15 Mass. Rep. 112. 1 John. Ch. Rep. 482, 350. 2 id. 512. 11 Wheat. 90. 1 Burr. Rep. 395, 474. 7 John. Ch. Rep. 201.)

9. The only duty required of the Supreme Court in this case, under the statute for the partition of lands, by virtue of which this suit was instituted, was to "ascertain and determine the respective rights of the parties, and to give judgment that partition be made accordingly." (Statutes of Partition in this state: Br. ed. L. N. Y. 82; 2 Livingston & Smith's ed. 237, 242; 1 Van Schaack's ed. 76, 108, 111, 144, 408 to 414; 2 id. 215; 1 Jones & Varick's ed. 201 to 208; 2 id. 185; 1 Greenleaf's ed. 165, 296; 2 id. 13, 340, 422; 3 id. 44, 129, 465; 1 K. & R.'s ed. 217, 542; 3 Webster's ed. 625; 4 id. 440; 5 id. 79, 207; Sess. 34, ch. 43; 1 Van Ness & Woodworth's ed. 507; Sess. 37, ch. 108; Sess. 44, ch. 130; Sess. 49, ch. 157. English Statutes of Partition: 31 H. 8, ch. 1; 32 H. 8, ch. 32; 8 & 9 W. 3, ch. 31; 3 & 4 Ann. ch. 18; 7 Ann. ch. 18.)

As to the pleading to the title or possession, the counsel cited Co. Ent. 412, 418; id. 181, 182; 3 John. Cas. 128; 2 Cain. Rep. 385; 2 Salk. 685; and 11 Mod. Rep. 104.

As to estates of lunatics, they cited 4 Com. Dig. Idiot, (c); 1 R. L. 147, § 6. □

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*They cited and commented on Co. Lit. 167, a. id. 252; and 2 Harr. & M'Hen. 254, relied on by the plaintiffs in error to show that partition is a possessory action.

They said Clapp's entry was no disseisin of his co-tenants, (7 Wheat. 59. 4 John. Rep. 399. 5 John. Ch. Rep. 407. 2 Serg. & Rawle's Rep. 461. 3 id. 111, 381, 509. 4 Mass. Rep. 416, 418. 1 John. Cas. 23, 125; 86 in note. 1 John. Rep. 540. 6 id. 127. 1 R. L. 182, § 2. 5 Cowen, 371, 374. 1 Burr. Rep. 60, 108, 109, 113. 6 Com. Dig. Seisin F, 2. 1 Cowen, 733. Cr. Lit. 3 b, 18 b, 237 a, b, 257 b, 153 b, 330 b, and note 285. id. 166, 246 a. Cro. Elin

640, 64, 220. Cro. Car. 302. 12 John. Rep. 365. 3 id. 229, 237. 3 John. Cas. 124. Clayt. 111. 2 Cruis. Dig. 639. 2 Salk. 423. 1 id. 286, 246, 189, 392. Lit. § 279, 368, 366. 12 John. Rep. 527. 1 Salk. 139. Co. Lit. 283. 2 Cruis. Dig. 497, 530. 5 Wheat. 116, 124. 3 Bac. Abr. 504. Cowp. 217. 1 East 568. 2 Cruis. Dig. 534. 4 Com. Dig. 71. Co. Lit. 242 b. note (1.) 1 Salk. 423. 5 Burr. 2064. Gilb. Ten. 27, 28. Ld. Raym. 387, 393. Bal. on Lim. 25. 2 Bl. Rep. 390. 1 Sch. & Lef. 418. 3 P. Wms. 145. Cowp. 217, 701. 7 T. R. 389, 389. Gilb. Ten. 28. 4 T. R. 680. 1 id. 270. 1 Roll. Abr. 659, pl. 15. Aleyn's Rep. 8. 9 Vin. Abr. 91, 92. 9 John. Rep. 102, 163. 1 Cowen's Rep. 285. 16 John. Rep. 210. 14 John. Rep. 304. 2 id. 230. 1 John. Rep. 156.)

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They insisted that, upon the whole record, the judgment of the supreme court should be affirmed.

JONES, Chancellor, delivered the opinion of the court.

The defendants in error in this cause, claiming to be entitled each to one ninth part of a farm in the town of Schoharie, in Rensselaer county, presented their petition to the supreme court, at the August term of that court, in the year 1823, under the act of 12th of April, 1813, for the partition of lands, stating that each of them was seised in fee of the ninth part of the premises as tenants in common, and that Clapp, the plaintiff in error, was tenant in common, as purchaser, from one Peter Bromaghnam, of the ninth part thereof; and that the owners of the residue were unknown to them, the petitioners; and praying that commissioners might be appointed according to law, to make partition thereof. Clapp, the plaintiff in error, pleaded in bar to the demand of the petitioners for partition of the said premises, sole seisin of the same in fee in himself, at the time of preferring the petition, and at all times afterwards, with a traverse of the alleged seisin of the petitioners or either of them, as tenants in common thereof; and to this plea subjoined a notice of his intention to give in evidence, at the trial, that the petitioners never were seised of the premises, but that, on the contrary, he at the

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time of exhibiting the petition, was, and still continued the sole owner thereof, and seised in his demesne of the same as of fee, and had been so seised for 25 years previously to the exhibiting of the petition, adversely to the claims of the petitioners, and of all persons whatever.

The petitioners, in their replication, protesting that the defendant below was not solely seised and possessed as by him alleged in his plea, take issue upon the traverse, and say, that they, the petitioners, are seised of the premises as tenants in common, in manner and form as alleged by them in their petition. Upon this issue the parties went to trial, and the bill of exceptions taken at the trial, presents the facts which give rise to the questions now before the court.

Summary of
the evidence.

It appears, from the testimony disclosed by the record, that William Bromagham, deceased, the father of the petitioners, was, in his lifetime, seised of the premises in fee, subject to an annual rent reserved by the deed of conveyance, and made payable to the grantor and his heirs and assigns for ever; that William Bromagham, about four years before his death, became a lunatic; and that his sons Peter and Isaac, by the common consent of the family, took the charge, possession and management of his farm; that Peter was, on application to the court of chancery, appointed the committee of the person and estate of the lunatic; that Peter, shortly before, or after his appointment as committee, purchased the share and interest of Isaac in the premises; that William Bromagham, the lunatic, died January 15th, 1799, leaving nine children, among whom were the petitioners, and Peter and Isaac Bromagham; that Peter, the committee of the lunatic, *had the sole possession of the whole of the premises at the time of the death of the lunatic, and claimed to be the absolute and exclusive owner of the same; that he continued to hold the same as his own, adversely to all other persons, until the 29th of November, 1802, when he contracted for the bargain and sale of the same to John Clapp, the plaintiff in error, for £1000, and agreed to deliver the possession of the farm to Clapp, on or before the first day of May then next; that the possession

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of the farm was delivered prior to the first of May, 1803, to Clapp; that the premises had been conveyed to him, and the consideration money fully paid by him, and that ever since he first entered into the possession thereof, he has held, possessed, and enjoyed the same, as the sole, absolute and exclusive owner thereof, and paid the rents therefore without any interruption or claim, until the petition and notice for the partition thereof by the petitioners were served upon him on the 10th of May, 1823.

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These are the prominent facts of the case. The judge was of opinion that the petitioners had maintained the issue on their part, and were entitled to the three-ninths of the premises claimed by them as tenants in common with Clapp and the other unknown owners; and so charged the jury, who found a verdict accordingly; and the supreme court have confirmed the opinion expressed by the judge at the trial, and given judgment on the verdict.

The questions for the consideration of this court, then, are, what the issue between the parties was? How far that issue was sustained by the petitioners? What points of law were involved in it, and how they were settled by the supreme court, and whether the decision of them was correct or not?

The issue was upon the seisin and possession of the petitioners. The petition alleged that each petitioner was seised of one equal undivided ninth part of the premises, as tenant in common in fee. The defendant's plea is, sole seisin in himself, with a traverse of the alleged seisin of the petitioners; and the petitioners take issue on the traverse, reiterating the allegations of the petition; that they were seised of the premises as tenants in common, in manner and from as alleged in their petition. It was incumbent, then, upon the petitioners, on this issue, to prove that they were seised as tenants in common of the shares of the premises claimed by them, at the time of presenting the petition.[1] The evidence on their part went to show that the ancestor was the proprietor of the

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Petitioners should have shown seisin when their petition was presented.

[1] Eggleston v. Bradford, 10 Ohio, 312. Wilson v. Inloes, 11 Gill & J. 351. 1 Chity Pl. 190

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farm, and died seised of it, leaving nine children his heirs at law, and they were three of those children and heirs; and supposing them to have established those facts, did that proof show them to be seised, at the time of presenting the petition, of the three ninth parts of the premises claimed by them? If they had gone one step farther, and shown an entry by them upon the farm so descended to the heirs, and a continuance of their possession actual or constructive, to the time of suing for a partition of it, they would have proved the affirmative of the issue taken by them, and have established a *prima facie* right to partition, which unless repelled by the proof, must have prevailed. But no entry or possession is shown by them; and the testimony decisively proves, as the supreme court concede, that the defendant's possession was adverse to them from the 3d of May, 1803, when he was in possession, claiming title under a conveyance to him of the whole. I attach no importance to the objection, that he claimed under the agreement only for the purchase of the farm, and did not produce a deed. Indeed, little stress was laid upon it in argument. The title was equally adverse to the petitioners, whether it was held under the agreement or the deed of Peter, claiming to convey or to contract for the conveyance of the entire farm. [1] Then could the petitioners be seised of premises which were held adversely to them? The fact of adverse possession was, I am aware, denied on the argument; and the verdict was insisted upon as decisive against it, and as settling the point in favor of the petitioners. But the record shows that the verdict was taken by consent, subject to the opinion of the court on a case agreed upon by the parties; and that the case was afterwards turned into a bill of exceptions. The bill of exceptions is before this court, and discloses to us the evidence which was before the jury, and the opinion expressed to them upon it by the judge. It appears that the verdict was given under the charge and opinion of the court, which must be taken to have had an influence upon

Possession of defendant below was adverse from 3d May, 1803.

Semb. a possession may be adverse though the title be claimed under an executory agreement: and Jackson v. Johnson, (5 Cowen 74,) contra is therefore overruled.

[1] *Fosgate v. Herkimer, Man. &c. Co* 12 Barb. 382.

it; and that charge is now before this court, upon an exception to it as erroneous, for relief against the erroneous finding it is alleged to have induced.

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It is not the finding of the jury, but the opinion and charge of the judge which induced that finding, that are brought before us for review; and we are not to look to the formal verdict on the record, but to the evidence returned to us in the bill of exceptions, for the matters that bear upon the points on which we are to adjudicate. Now, the bill of exceptions clearly shows, that the fact of the sole and exclusive possession of the farm, by Clapp, the defendant below, as the absolute owner of it, claiming the title adversely to the petitioners for more than 20 years without interruption, claim or disturbance from them, was fully proved; and it was assumed, and in terms, conceded by the court below, on their decision of the cause. That fact, therefore, not having been drawn in question, cannot be intended to have been passed upon by the jury. It was the legal effect of that fact upon this case, that was the point in dispute between the parties; and that legal effect was a question of law. In ordinary cases between strangers, litigating in possessory actions, such a possession would be a conclusive defence in law against the claimant. If it was unavailing to this defendant in this form of action, the inefficacy of it must proceed either from some relation between the parties as joint owners, or from the nature and form of the remedy by partition.

These parties, it is said, stood in the relation of tenants in common to each other; and the possession of one of them was, in judgment of law, the possession of all of them [1] and in support of the position, it is said, that the title of the defendant was derived from the same source with that claimed by the petitioners; and it was contended that the defendant entered under the title vested in Peter, as tenant in common with the petitioners; and that his possession could not be adverse to them, but enured to their benefit.

[1] *Humbert v. Trinity Church*, 24 Wen. 586. Dig. N. Y. Rep. by Hogan, tit. adverse possession.

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Where a tenant in common enters adversely claiming in severalty, the statute of limitations runs against his co-tenants.

But, is it true that the defendant's entry was as tenant in common? There is no colour for the suggestion. On the contrary, the bill of exceptions clearly shows that he entered as purchaser of the whole, and held as tenant in severalty, claiming to be the sole and exclusive owner; his title was, from its commencement, adverse to the petitioners; he never held in common with them, nor acknowledged any right in them or any of the heirs of William Bromagham, the ancestor; he purchased of Peter as being the sole proprietor, and who at the time claimed to be, and was supposed to be the exclusive and absolute owner of the farm; and he has from that time to the commencement of this suit, continually claimed and held the premises in exclusion of all others, and has had the sole seisin. How could that seisin and possession enure to the benefit of the petitioners? It is conceded that a disseisin by one tenant in common will sever the joint possession, and turn the title of the co-tenants to a right; but it is contended that no exclusive possession, short of an actual disseisin, will have that operation [1] and that no such disseisin has been shown by this defendant. It has been said in modern times that the characteristic properties of disseisin, as it was understood in ancient times, has been lost, or become by disuse so obscure as not to be now discernible; and it is probable that some of the nice distinctions which once prevailed may not, at this day be perfectly understood. Indeed, it is possible that some shades in the definitions of the disseisin by election may be lost to us. Nor is the character of *disseisin in fact* entirely free from difficulties; but these arise more from the changes it has undergone, than from any intricacy in the legal sense of it in its origin. The history of the English system of jurisprudence abundantly shows that the meaning attached to the term has varied with the state of society, and the rules applicable to the enjoyment of real estates; and much subtlety and some confusion was introduced into its doctrines for the purposes of the remedies which were engrafted upon it. But it was

[1] *Humbert v. Trinity Church*, 24 Wen. 586. *Jackson v. Tibbits*, ante 741. *McCluny v. Ross*, 5 Wheat. 116.

in every stage of it, in substance, the act of divesting the owner of his seisin and possession of the land, and substituting in its place the ownership and possession of the disseisor. In its origin, when the seisin constituted the title of the owner to his freehold, it was the forcible expulsion of the tenant, or the wrongful entry upon him, and the forcible holding by the intruder, which was called a disseisin; and in those days, force would naturally be employed to effect a change of possession by a wrong doer. [1] But in after times, when the titles to land became more complex, and possessions more diversified, other acts were held to be disseisins. It would be as preposterous to look for the same acts of disseisin in our day that usually occurred in the simple times of high antiquity, as to expect to find the same customs and manners in this age that were the characteristics of those. The wrong doer does not, in our times, forcibly, and without the claim of right, expel his neighbor from the tenements he covets, nor hold the owner out with a strong hand of power; yet if he silently enters upon the possession of a stranger, and either under pretence of right which he knows to be groundless, or without colour of title, usurps and claims it as his own, keeps out and sets at defiance the former possessor and all others, and holds exclusively, claiming the fee, who will deny him to be a disseisor? The act partakes too largely of all the properties of the ancient disseisin to be distinguished from it. The owner is divested against his will of his seisin and possession, and that seisin is usurped by another who wrongfully holds it as his own. In modern times, an ouster by any means short of actual force, is generally identified with adverse possession, which is understood to embrace every possession held by the possessor in exclusion of others. But an ouster effected without the employment of force, often is, in effect and all practical purposes, a disseisin; and in the case now under consideration, the exclusive possession and holding of Peter, under a claim of title to the whole farm, and accompanied with acts of ownership co-extensive with the claim, if

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Disseisin
was always in

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substance, the
divesting the
owner of his
seisin and pos-
session, and
substituting
the ownership
and possession
of the disseisor.

Disseisin now
is an entry and
claiming as
one's own
with or with-
out color of
right, and
keeping out
and setting at
defiance the
former posses-
sor and all
others.

Actual force is
not necessary
to a disseisin.

[1] Varick v. Jackson, 2 Wen. 166, 4 Kent † 482 et seq.

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Bromagham.

A deforcement
is equivalent
to a disseisin
in respect to
constituting
an adverse
possession.

[*554]

Farther, as to
the entry of a
tenant in com-
mon claiming
in severalty
and his subse-
quent acts and
sale of the
whole.

Though one
enter as com-
mittee of a
lunatic, a sub-
sequent sale
and claim of
the title abso-
lutely changes
the character
of the posses-
sion, and
makes it ad-
verse.

wrongful against the petitioners, was a disseisin of them, or rather it was technically a deforcement, which is of the same family with a disseisin, and, as regards the point in question in this cause, has the same properties.

If, as is contended, the estate descended on the death of the lunatic to his nine children, they took it under our statute of descents, (1 R. L. 52, s. 3,) in coparcenary, in the same manner as if they were all daughters of the deceased father. *Peter was in possession, at the time of his father's death, and set up a claim to the whole estate, not by descent as heir to his father, but as purchaser or otherwise against the descent, and it is at least questionable whether his entry, disclaiming all title by descent, and insisting upon a distinct title, could accrue to the benefit of the other coparceners. But, if it did, his subsequent acts and avowed claim to the whole, and entire exclusion of the coparceners from all participation in the use of it, or the rents and profits of it, and his sale to Clapp, with the entry and sole possession of Clapp as owner, were the highest and most unequivocal acts of disseisin, or at any rate, of adverse possession, that could possibly be done. [1] Peter, in the first instance, and Clapp afterwards entered for himself, exclusively claiming the whole; and the sale by Peter to Clapp was perfectly decisive of the character of his entry, and the exclusive nature of his possession. If Peter was a co-partner with his brothers and sisters, he usurped the whole and held out all his companions. The other children of the lunatic never had any possession of the premises subsequently to the death of the father, unless the possession of Peter enured for their benefit. But, if he was a deforciant, his possession was adversary to them, and if there was anything equivocal in that possession, or his original entry and possession as committee of the lunatic could qualify it, his sale of the whole to Clapp, and Clapp's entry and possession, were clearly adverse.

Lord Mansfield in the case of *Doe v. Prosser*, (Cowper,

[1] Adverse possession can only exist as against a person entitled to the possession. *Clark v. Hughs*, 13 Barb. 147. *Jackson v. Schoonmaker*, 4 Jehn. 389.

129,) held that a man may come in by a rightful possession, and yet hold over adversely without a title. He gave for examples, a tenant *per auter vie*, holding over for 20 years after the death of *cestui que vie*, which he says, would be a bar to the remainderman or reversioner in ejectment; (q) and he gave also the case of tenants in common, observing as to them, that the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because his possession is not adverse to the right, but in support of the title. But, that, if he denies the title of his companion, claiming the whole, will not pay his companion his share, and continue in possession, such possession is adverse and ouster enough; and that actual hindrance is not necessary. And *Ld. Kenyon in Peaceable v. Read*, (1 East, 568,) gave his sanction to the doctrine. So it has been held that an entry and sole occupation of the whole, keeping the co-tenants out, gives the possession the character of a disseisin or an adverse possession, (5 Burr. 2604. 1 Atk. 493. 2 id. 632.)

Anciently the rule was, that an actual ouster or forcible dispossession of the co-tenant was necessary to constitute a disseisin. That rule was afterwards relaxed, and the exclusive receipt of the profits by one, withholding from his companion all participation in them, or an actual hindrance of the companion from entering or sharing the possession, was adjudged to be sufficient evidence of an adverse holding. And afterwards it was held, in *Doe v. Reid*, (11 East, 51,) that one tenant in common in possession, claiming the whole and denying possession to the other, is evidence of an ouster; and that it is not indispensably necessary to make the possession adverse, that there be a receipt of the rents, and an actual hindrance of the co-tenant from entering. Nor has this rule been recently introduced. It obtained in England long prior to the separation of this country from that. It is laid down in *Viner's Abridgment*, that although the entry of one tenant in common is the entry of both, yet, if one enter, claiming

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Tenant *per auter vie* holding 20 years adversely after the death of *cestui que vie*, bars remainderman or reversioner.

The possession of a tenant in common, *eo nomine*, will never bar his companion. [*555]

Farther, as to the adverse possession of a tenant in common, and what acts constitute it

(q) And *vid. Jackson v. Harsen*, (6 Cowen, 323.)

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the whole, this will be an entry adverse to his companion, (14 Viner, 512, pl. 5;) and the editor notes in the margin, that the possession of one heir in gavelkind, claiming the whole,*is adverse.

In 2 Atkeyns, 632, Ld. Hardwicke ruled that a fine and non-claim by a tenant in common will bar his companion, if he does not call the party to an account for the profits; for this, he observes, has always been admitted to be evidence of an ouster.

[*556] The supreme court of the United States, in Ricard v. Williams, (7 Wheaton 60,) take the true distinction. There is no doubt, they say, that in general, the entry of one heir will enure to the benefit of all; and that, if the entry is made *as heir, and without claim of an exclusive title, it will be deemed an entry, not adverse to, but in consonance with the rights of the other heirs; but it is as clear that one heir may disseise his co-heirs, and hold an adverse possession against them as well as a stranger; and that notwithstanding an entry as heir, he may afterwards, by disseisin of his co-heirs, acquire an exclusive possession on which the statute will run. They admit that an ouster or disseisin is not to be presumed from the mere fact of sole possession; but they say, that it may be proved by such possession, accompanied with a notorious claim of an exclusive right. In that case, the entry was made by an heir under an exclusive claim to the whole, not by descent; but by the title distinct or paramount; and it was held that there was no incapacity in the heir to claim an estate by title distinct or paramount to that of his ancestor; and if his possession is exclusive under such claim, and he holds all other persons out until the statute period has run, he is entitled to the full benefit and protection of the bar. (b) [1]

The entry of one of several heirs claiming the whole, and denying possession to his co-heirs, and selling the land to a stranger constitutes a possession adverse to the co-heirs, and being continued 20 years, bars the entry of the co-heirs.

These principles appear to me to apply to this case, and to govern it. Here was an entry by Peter, claiming the whole; he was in possession claiming the entire estate;

(b) And vid. ante, 252-3, and the cases there cited.

[1] Prescott v. Nevers, 4 Mason 326. Parker v. Proprietors &c., 3 Metcalf 91.

he denied possession to his brothers and sisters ; he sold the farm to a stranger ; received the full value of the land, and delivered over the possession to the purchaser, who has ever since held and used it as his own ; and if Peter or his vendee had the power to make a disseisin or an adverse possession, this possession must be held to be adverse. In this case, there was more than the mere fact of sole possession. It was accompanied with a notorious claim of exclusive right. The possession was exclusive under that claim, and all other persons were held out until 20 years, the statute limitation to the right of entry, had run. [1]

The deed of conveyance from Peter Bromagham to Clapp was not produced ; but the agreement was sufficient to show that the entry and possession were under a claim of title ; and the confidence of Clapp in the validity of that title is conclusively shown by the consideration he paid for the land.

*It is settled by the decisions of this court, that it is enough that the possessor be in under a claim of title to clothe it with the character of an adverse holding, and to give it efficacy as a defence, when of sufficient age to be a bar ; and that an invalid or defective title, if believed to be good, [2] will be equally operative with a valid one in giving effect to a possession taken and held under it. (*La Frombois v. Jackson*, 8 Cowen, 569.) If, therefore, Peter, or his vendee, erred in supposing that he had acquired a good title to the farm, still the exclusive possession of it, claiming an exclusive right to it under that title, however defective or invalid it may have been, was sufficient after the lapse of twenty years, to bar the entry of the petitioners, and to put them to their writ of right.

Conceding, then, for the sake of the argument, that Peter had no title to the shares of the farm now claimed by the petitioners, but held them by wrong ; still, if his possession was a disseisin or deforcement, Clapp is entitled to the

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v.
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Farther that
a possession
under an exe-
cutory agree-
ment for a ti-
tle may be ad-
verse.

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Possession
under a claim
of title with or
without a valid
deed, is ad
verse.

[1] *Rees v. Durham*, 4 Dev. & Bat. 54.

[2] *Livingston v. Peru Iron Co.* 9 Wen. 511.

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v.
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protection which the law confers on the alienee of a dis-
seisor or deforciant; and if the previous acts and posses-
sions of Peter were not, in judgment of law, an ouster of his
co-tenants; yet his sale of the entire estate to Clapp the
defendant below, and the absolute purchase of the premises
by the *defendant* below for the full value of the whole inter-
est, and his entry under the agreement for the purchase, as
sole absolute and exclusive owner, and his subsequent claim
of ownership, characterized his possession as adverse to the
petitioners; and in either case, their entry was tolled by
his possession, and he was entitled to the protection of the
statute bar against their claim. [1]

Semb. that
an adverse pos-
session taken
in fraud of the
true owner
shall not avail.

Clapp's pos-
session not
fraudulent.

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But, it was contended that the purchase and possession
of Clapp were fraudulent; and if that objection to the title
was well founded, it might be fatal; for fraud vitiates
whatever it touches. [2] But there is no ground for the
imputation. Clapp was a stranger to the family, until the
time of the purchase, and resided at a distance from them.
He made the purchase nearly three years after the ancestor's
death. Peter, the vendor, was in the actual and exclusive
possession of the premises at the time, and claimed to be
the absolute and exclusive owner. He was understood in the
neighborhood to be so; and Clapp treated with him as such.
He may have been incautious and indiscreet in completing
the purchase without sufficient enquiry and due precaution-
ary measures for his security; but that was imputable either
to his negligence or to his confidence in the representation of
Peter the vendor; and the consequence of a failure of title
would have fallen upon himself alone. It is no proof of
fraud; and shows no sufficient ground for any presumption
injurious to his integrity. Purchasers are too apt to disre-
gard the caution of the law, *caveat emptor*; and to rely
upon the apparent ownership of the possessor and his assur-
ances of his title, without instituting proper inquiries into its

[1] *Ross v. Durham*, 4 Dev. & Bat. 54.

[2] 9 Wen. 511. But the law will never construe a possession tortuous
unless from necessity. On the other hand, it will consider every possession
lawful; the commencement and continuance of which is not proved to be
wrongful. *Richard v. Williams*, 7 Wheat. 107: per *Stoxx, J.*

validity. But it would be a most severe and alarming principle, to impute fraud or notice of the defect or invalidity of the title to the neglectful purchaser. The rule of law is otherwise. It does not charge the purchaser of real estate with notice of the title, nor affect him with any imputation of fraud in taking a bad one. It holds want of notice or knowledge to be immaterial. The purchaser takes the title at his own risk; and if it proves defective, and the true owner uses due diligence and interposes his claim in time, the purchaser must lose his estate. But even in that case, when the title is palpably defective, the party who has the right, must prefer his claim and prosecute his suit within the time prescribed by law, or the possession of the purchaser under his defeasible title will cure the defect, and ripen his claim into a right.

The rules of law, therefore, relative to notice, or the sufficiency of disclosures to put the party on enquiry, are inapplicable. To affect the defendant with fraud, clear and positive proof was necessary. It ought to have been shown that he knew Peter's title to be bad, and that the same belonged in fact to all the heirs of the ancestor; or that the petitioners were entitled to the shares they now claim to belong to them, and with such knowledge, colluded with Peter to defraud them. Not a trace of any such evidence appears. The only circumstance from which any knowledge, by Clapp, of the family, can be inferred, is, that he knew Isaac to be the brother of Peter. But the knowledge of that fact, so far from leading to any doubt of Peter's ownership, seems to me strongly to confirm the truth of his representation; for Isaac stands by, and sees Peter contract for the sale of the whole farm, without objecting to the sale or intimating to the purchaser a doubt of Peter's right to sell. Fairness required a disclosure of the adverse claim of the other members of the family, if any claims were made by them; and the purchaser had reason to conclude that Peter was, as he appeared and assumed to be, the real and sole owner of the farm. It appears that part of the purchase money remained unpaid

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Bromagham.

Neglect to inquire into a title is not fraud; nor should notice of a defect in title be imputed to a purchaser because he is negligent so as to preclude him the benefit of the statute of limitations.

Though the title of an adverse possessor be palpably defective, the true owner must sue within 20 years, or he is barred his entry.

The rule that what is sufficient to put a party on inquiry, is notice, does not apply to a purchaser who claims

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under the statute of limitations. Clear and positive proof of notice is necessary that the title supposed to be acquired is bad, accompanied with proof of an intent to defraud the real owner. Evidence on the question of fraud.

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Bromagham.

until 1805; and that Clapp, prior to that time, had become acquainted with William, another brother of Peter; and from these circumstances, and the total silence of the petitioners, and all the other children on the subject of their present claim, I infer, that they either had no well founded claim, or were conscious that, for some cause, good faith forbade them to prefer it. The purchase was a matter of notoriety. Clapp removed from a distant county with his family, took possession of the farm, and openly exercised all the customary acts of ownership over it, avowedly as the absolute purchaser, regularly paid the rents, and at different times discharged the purchase money. Was this the conduct of a fraudulent purchaser? Was any imposition practised on the petitioners, any artifice made use of to deceive them, or any act done to mislead them? All the circumstances attending the transaction concur in showing that they were not known by Clapp to have any right or pretensions to the estate; and the fact of the purchase of the farm at its full value, and the deliberate payment of the entire consideration by different instalments, is conclusive and convincing proof of his good faith, and of his full confidence in the title of Peter, and entire ignorance of the claims of the petitioners.* The actual payment of the full value for the purchase of a farm, with knowledge that the title was invalid, and that he might be at any moment evicted, would have been an act of weakness and folly, and not a proof of fraud or bad faith. But on the other hand, the petitioners, or some of them, or those they represent, lived in the county of Rensselaer in the vicinity of the premises, at the time of the sale to Clapp, stood by and saw him enter into possession, take the title from Peter, pay him the consideration, and exhaust his substance in improvements; and yet, for twenty years, they observe a total silence on the subject of their present pretensions, utter no complaint against the purchaser, and take no step to test his title or enforce their own claims. They surely come with an ill grace now into a court of justice, to revive a stale demand, and reap the fruits of the industry of an innocent purchaser, who

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has been lulled into security by their silence and acquiescence; and will, if they succeed, have devoted his life to their service.

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Can these petitioners be heard to charge this purchaser with fraud, or be permitted to found any claim upon the presumption of his knowledge of their rights? If they have established a title, and if this suit is the proper mode of availing themselves of it, and they are in season to assert their claim, the courts will enforce it. But the defendant below is entitled to all the protection this court can give to a *bona fide* purchaser for a valuable and full consideration; and his defence is entitled to attention.

To return then to the issue between the parties. I concur in the opinion of the supreme court, that the possessory right, or the right of entry of all the petitioners, was barred by the lapse of time; upwards of 20 years' possession having run against them all, and more than ten years having elapsed since the death of the husband of Jemima, who was under coverture when the disseisin or adverse possession commenced. Then did the petitioners prove the issue on their part, and show that they were seised of three-ninths of the premises as tenants in common with the defendant?

Jemima, the
feme covert
was barred by
adverse possession
of 10 years
after her husband's death.

Seisin imports possession; and when averred in pleading is predicated of the possession in fact of the premises. Thus, in writs of right, the demandant claims the right and inheritance, and avers his seisin in the past time, not the present; alleging that he was seised within twenty-five years, and not that he is seised. So, in the writ of entry, a similar form is used in alleging the seisin; and the reason is, that in both cases the plaintiff has been ousted of his possession, and cannot, with truth, aver himself to be seised. But in partition, the plaintiff or petitioner must allege that he is seised, which imports a present possession as tenant in common or coparcener; and hence it is that *non insimul tenent* is the appropriate issue in partition, because the parties cannot hold together unless their possession as well as their titles, are in common. The fact of an adverse

Seisin, when
averred in
pleading
means seisin in
fact, which imports
possession in fact.

Seisb. that
in petition, the
plaintiff or petitioner
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tioner must
allege that he
is seised, and
show a present
actual possession.
A mere
right of entry
will not satisfy
the averment;
so that a subsisting adverse
or proceeding

possession of the co-tenant, though short of 20 years, is a bar to the action

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v.
Bronnaghram.

holding by one against the other shows that they cannot hold together, and *pro indiviso*; for the party in possession holds the whole in exclusion of the others. A mere right of entry, if shown, will not satisfy the terms of the issue; for there is no seisin in the party who is ousted.

Now it is admitted, that the possession was held by Clapp adversely to the petitioners, at the time of presenting the petition. It follows, that, if adverse possession has the same operation and effect as a disseisin before a descent is cast or the entry is tolled by lapse of time, the petitioners were not seised of any part of the premises, at that time, as tenants in common; and they failed in the issue. The verdict of the jury therefore, ought, in such case, to have been against them and no judgment of partition given.

Coke, in his commentary on Littleton, says, that if one coparcener disseise another, during the disseisin a writ of partition does not lie between them. The text of Littleton and the Year Books sustain the position; and the reason given for it is, that they do not hold together and undivided. (Co. Lit. 167, b. 4 H. 7, fol. 9, b. 11, Ass. 23.) Yet the disseisee has a right of entry, and is entitled to his share of the estate when reduced to possession; and if it be a decisive objection to a partition, that one of the tenants in common is disseised by the other, on the ground that, during such disseisin, they do not hold together, the same objection applies with equal force and upon the same reason, to the case of adverse possession; for, in that case, as in disseisin, they do not, during the continuance of the adverse possession, hold together. The law, as laid down by Coke, is recognised by Baron Comyn in his valuable Digest; and Viner in his Abridgment, treating of partition by coparceners, observes that the word *tenet* in a writ *always implies a tenant of the freehold; and therefore if one of them be disseised by the other, no writ of partition lies. (16 Viner, 225, partition,) 1.

In the case of *Bradshaw v. Callighan*, in this court, (8 John. 558,) the rule was admitted, that if one coparcener is disseised by another, no writ of partition will lie; and the reason there given, is, that in England the word

tenet in a writ, always implies tenant of the freehold. It is settled, then, that a writ of partition would not lie at common law by a coparcener who was disseised by her companion; and that a plea of sole seisin was good.

In this case, the petitioners never had a seisin of any part of the premises, unless they acquired it by the entry or possession of Peter; for he had exclusively the possession at the death of his father; and if he held that possession for himself solely, and kept out the rest of the heirs, he was a deforciant, and they had neither a seisin in fact nor in law of the undivided shares they claim. But if they ever could be regarded as constructively in possession by the entry of Peter, their coparcener, they were ousted by his subsequent acts and sale to Clapp; and from that period, at all events, the possession has been adverse; and they have had no seisin of the premises.

It was strenuously contended on the argument, that this adverse possession was a disseisin, and some of the later cases countenance the opinion, that an adverse possession is a disseisin. To many purposes, it may be so considered; and though there are points in which they differ, yet in the aspects under which we are now viewing them, they are substantially the same, and produce the same effect upon the title. The disseisor, if he continue himself to occupy the premises, may at any time before the right of entry is lost by lapse of time, be evicted by the disseisee; and so may the adverse possessor; and in such cases, where no descent is cast, the adverse possession, if suffered to run, will mature into right as soon as the disseisin. It is not material, therefore, for the purposes of this suit, to enter into a critical enquiry of the relative properties of disseisin and adverse possession, or to note the distinctions between them. It is well settled that the adverse possession of one tenant in common or co-parcener is an ouster of the co-tenants; and that a continuance of it for twenty years as effectually tolls the entry as disseisin of the same duration, or a descent cast upon the heir of the disseisor. In this case there has been an adverse possession for more than twenty years. I am not now called upon, therefore,

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The petitioners here were not seized when they presented their petition.

Semb. that disseisin and adverse possession are the same in effect as to destroying the common possession or seisin of tenants in common, and operating as a bar under the statute of limitations.

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to express an opinion of the effect of an adverse possession, for a shorter period, upon the question of seisin in an issue on the plea of *non tenent insimul*, or upon the suit of the party who is out of possession for a partition. I have already intimated my views to some extent on these points; and shall press them no further.

But if adverse possession differ from disseisin in this; that the adverse possession of one tenant in common will not divest the seisin of the other tenants in common, till it tolls their entry, yet after it continues 20 years, thus tolling their entry, and leaving them a mere right, it destroys the common seisin; and in that sense bars a writ of partition, or a proceeding for partition under the statute (sess. 36, ch. 100, 1 R. L. 507.) The cotenants out of possession are thus put to their writ of right to recover their share, and gain their seisin, before they can maintain partition.

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Statute of
partition (1 R.
L. 507) ex-
amined.

But suppose the adverse possession to differ from the disseisin in this; that until it tolls the entry it will not disturb the seisin of the cotenants, who are kept out by the usurper, nor obstruct the prosecution of a writ of partition, (which is the broadest concession that can be asked for,) still the right of entry in this case was tolled; and how then can it be contended that the seisin of the petitioners continued, or that partition could be demanded by them? They were, in the language of the law, divested of all title to the land but the mere right; and were put to their writ upon that right as their only remedy for the recovery of the part of the estate they claimed. It is clear, that the party who has lost both the possession and the right of possession; and has a mere right only, is not seised of the estate, either in fact or in law. How then could these petitioners sustain the averment of seisin in the petition, or the issue taken on the traverse? Why was not the proof of adverse possession for twenty years a decisive defence? and if so, how could the suit for partition be maintained before they had regained the seisin and possession of the land?

But this was a proceeding under the statute of this state for the partition of land, and not a writ of partition at common law; and it was assumed in argument, that the jurisdiction of courts of law, on petition for partition, has been extended by the act to cases of the mere right, equally with those of the seisin and possession of the petitioners. A brief view of the provisions of the act will be necessary to test the accuracy of this position.

The act (1 R. L. 507,) provides, that where any lands, tenements or hereditaments, shall be held in joint tenancy, tenancy in common, or coparcenary, it shall be lawful for any one or more of the parties interested therein, to pre-

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sent a petition to the supreme court, or mayor's court, or court of common pleas of the city or county in which the lands are situated, setting forth the rights and titles of the parties therein, and praying that the same may be divided by commissioners to be appointed by the court. A rule is to be entered on proof of service of the petition, that the parties defendants appear and answer the petition; and the defendants may appear and answer within such time as the court may allow them for that purpose; and such further pleadings may be had thereupon between the parties, according to the rules and practice of the court, as in other actions and suits depending therein, until an issue, or issues in law or in fact shall be joined between the parties, or some of them; and it is specially provided, that such of the parties as shall answer the petition, may plead thereto *non tenent insimul*, and give any special matter in evidence, under that plea, which might be otherwise pleaded; giving notice with the plea of such special matter. The issues are to be tried as in other actions, and power is given to the court to grant new trials, as in other cases; and after the final determination of all such issues, the court is to ascertain and determine the rights of the parties, and give judgment that partition be made between them, or such of them as shall appear to have any right therein, according to such rights. In this abstract of the first stages of the proceeding, several of the prominent features of the common law writ or partition are plainly discernible. The estate to be divided must be *held* by the parties to the partition in common, and the general defence against the petition for a division, is, that the petitioners and the defendants do not *hold* together. This was the substance of the demand, and of the general defence in the writ of partition. The intention was to substitute the petition for the writ; but to preserve the general outline and leading features of the action of partition, as far as the forms of the statute proceedings, and a due regard to the rights and interests of the parties would permit, and especially to adhere to the avowed purpose of the partition; the severance of the possession by a division or sale of the pre-

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mises; and not to introduce an entire new system, extending to other objects and governed by different principles. In conformity with this view of the subject, the act hath hitherto been, it is believed, uniformly applied to the purpose of dividing lands held in common among the part owners, and not to the purposes of litigating contested claims; and petitioners have supposed themselves bound to state in their petitions, and, if required, to show in proof that they were *seised*, at the time of presenting their petition, of the undivided shares they claim to have set apart to them. The petition invariably avers the seisin of the petitioners, and the petitioners, in this case, have conformed to the rule; so uniform has the practice been, that no question has ever been raised on the precise point. But the supreme court, in adjudicating upon the averments necessary to be made, and the effect of those that have been made in the particular instances which have come under the consideration of that court, have in effect, decided that the petitioners must aver a seisin of the parts of the premises they claim. Thus, in a case which occurred under the act of 1801, that court decided that an averment of seisin generally, implies a seisin in fee; and in the case of *Bradshaw v. Callighan*, (8 John. 558,) where the objection was, that the rights and titles of the parties were not set out at large in the petition, nor the seisin of the ancestor averred, but the seisin of the petitioners and their co-tenants only, and that the allegation of seisin was in general terms, it was held by this court, on a writ of error, in affirmance of the judgment of the supreme court, that the words of the statute are satisfied by alleging the seisin of the present owners, which constitutes their title, and that the general allegation of seisin was sufficient; plainly implying that an allegation of seisin is necessary, and that seisin must constitute a part of the title of the petitioners.

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*The supreme court, in the case of *Ferris v. Smith*, (17 John. 221,) proceed upon the same ground, and hold that the plea of *non tenent insimul* is not supported by showing the quantity of interest to vary from the statement of the petition; but is maintained by showing that the defendant

who pleads it had parted with all his interest. Indeed, the act appears to me to admit of no other construction. The tenements which the petitioners seek to divide, must be held in common between them and their co-tenants, and those terms if they do not require an actual seisin and possession at the time, certainly cannot be satisfied without a right of entry. When the right of entry is tolled, the estate of the owner is said to be totally divested, and put to a right. (2 Bl. Com. 197. Co. Lit. 345.) An actual disseisin produced that effect, and an adverse possession of 20 years' continuance, has the same operation. An owner thus put to a right, has no seisin either in fact or in law. He does not, in any legal sense of the term, hold the estate; and consequently, if he once was a tenant in common, or a coparcener with the disseisor or adverse holder, he has ceased to be so, and the entire seisin of the premises is in the tenant in possession, who holds the same in severalty; and the tenant who has been ousted and held out until his right to re-enter is lost, must reinstate himself by action in his seisin, before he can truly aver himself to be seised, or claim to hold in common with his former co-tenants. It follows that a special plea of sole seisin, or the general issue of *non tenent insimul*, to a petition for partition under the act, equally with similar pleas to a count in partition at common law, is supported by proof of a disseisin of the petitioners, or an adverse possession against them for twenty years; and that proof having been made in this case, the judge ought to have directed the jury, that if, in their opinion, an adverse possession for twenty years was sufficiently proved, they ought to find a verdict for the defendant against the petitioners.

This construction of the act is fortified by the provisions contained in the 13th section of it, by which it is enacted, that nothing contained in the act shall be construed in any manner to authorize the revival or prosecution of any claim to lands which might otherwise be barred by the statute of limitations, or by the acquiescence of any party having such claim; or to aid the prosecution of any claim that may not be so barred; but every such claim shall be and remain in the same situation as if the act had not been

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passed. The object of this section of the act was to remove all doubts on the construction of the first section, and to express in clear and decided terms the intention of the legislature to confine the provisions and operation of the act to its legitimate object, the division or partition of lands avowedly held in common, and to exclude all questions involving the right to the seisin or possession of the premises. The quantity of interest to which the part owners may be respectively entitled, and the conflicting claims of right or title when the possession is not drawn in question, but is admitted to belong to him who shall be adjudged to have the title, are to be settled by proper issues between the litigants, preliminarily to the first judgment of partition.

But the legislature deemed it unfit that the possession should be disturbed by proceedings for partition of premises held adversely to the petitioners; or that a party who has no right to enter upon the land, and enjoy it in common, should be entitled to have a part of it set off to him to hold in severalty. The right to have the estate divided, pre-supposes an acknowledged right to the possession and enjoyment of the part of it to which the petitioner claims to be entitled. It is the partition of lands in the possession of the part owners, that the act intends; and not the recovery of the possession of premises which are held adversely to the petitioners; and the act therefore limits the partition it authorises, to estates and interests actually held in common; requires the petitioners to set forth the rights and titles of the parties; and gives the defendants who appear, the plea of *non tement insinual* as the general issue; thereby authorising an issue which shall oblige the petitioners to show a seisin in themselves, to establish a right to a partition; and the lawgivers, for greater caution, in terms forbid any construction to be given to the act, or use to be made of it, which shall in any way control or interfere with the operation of the statute of limitations, *or aid the petitioners in obviating the impediments to the recovery of the premises they claim, from the provisions of that statute, or from their own acquiescence. Would the terms of those provisions of the partition act be satisfied,

by adjudging a partition, on the prayer of a petitioner, whose right of entry has been tolled by adverse possession, against the defence of the party in possession, on that ground? If the proceedings under the act are to have that operation, must not the defendant, though clothed with the absolute right of sole possession, lose the benefit and protection of the statute of limitations, against the claim of the disseisee or ousted co-tenants? Of what avail is his plea of *non tenent insimul* in such an exigency? In an action of ejectment, or a writ of entry to recover the possession of the premises, his defence would be conclusive; but if his assailant resorts to a petition for partition under the act, he is driven from his defence; and his possessory title is rendered useless and unavailing. When such a course of proceeding is held admissible, is not the act so construed as to authorise the revival and prosecution of a claim to the possession of land, which might otherwise be barred by the statute of limitations, or at least, to aid the prosecution of a claim not yet barred; and does such claim, after the judgment in partition, remain in the same situation as if the act had not been passed? It was urged, indeed, that the petitioners in this case, though they had lost the right of entry, were yet in time to insist upon their title, and to recover in a writ of right; and that upon showing such right upon the trial of the issue, they were entitled to a verdict and judgment under the act. But if the act will bear that construction, will it not repeal or supersede the statute of limitations as applicable to tenants in common, with the single exception of that clause of it which applies to a writ of right? Will it not defeat the possessory title acquired by disseisin or adverse possession, as between part owners? Could the claim, then, of the disseisee or ousted part owner, be said to remain in the same situation as if the partition act had not been passed; or would not the prosecution of such claim be aided by that act, and would not the obstruction interposed by the adverse possession which would *impede its prosecution at law, be removed? Might not the partition act be in all cases used by the demandant whose entry was

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tolled, as a substitute for the writ of right to try his title and reinstate himself in his right? and if so, would not the petition for partition be diverted from its original design, and become the process for the trial of titles, and the recovery of possessions between the part owners of lands?

But again, if the true construction of the act should be held to admit of an issue between the parties upon the mere right, must it not still be at the election of the defendant to tender that issue, or an issue upon the right of possession? The act allows him to plead any special plea, or the general plea of *non tenent insimul*, with notice of any special matter that might be pleaded. Now, if under this permission, the *mise* might be joined upon the mere right, yet the defendant clearly is not limited to that issue, but is in terms, allowed to plead the general issue, peculiar to the writ of partition, or to plead any special plea he chooses. In this case he has elected to plead sole seisin, and to traverse the seisin of the petitioners; and on that traverse the issue was joined. Must not the parties, then, be confined to that issue? And could the petitioners under it recover upon the mere right; or must they not show an actual seisin, or at least, a right of entry, to entitle them to a verdict? To obviate these difficulties, it was said that the proceedings in partition were not calculated or intended for the recovery of the possession, but to ascertain and determine the rights of the parties; and that the petitioners, after the judgment in partition, would be left to recover the shares allotted to them, in the action of ejectment or writ of right; to which actions the statute of limitations would remain a bar. But a moment's attention to the results of the judgment in partition will show this reasoning to be illusory and unsound. The judgment in partition, it is true, does not of itself change the possession; but it establishes the title, and in an ejectment or writ of right, must be conclusive. The suit will be brought by the party, not for his undivided part, but for his separate share of the premises allotted to him on the partition, and the judgment of the court, adjudging that share to belong to him, and allotting it to him to hold *in sev

A judgment in partition does not change the possession, but in an ejectment or writ of right it would be conclusive.

eralty, must be sufficient to entitle him to recover it. Nor do I see how an adverse possession could be a defence against an ejectment upon such a judgment. The answer to it would be, that the objection, if available, should have been taken to the partition itself; for that partition could not be made until the right was first ascertained and determined by the court, and that the judgment in partition had conclusively established the right and title of the parties, and proved the allegation of seisin made in the petition for partition to be true. How could adverse possession or disseisin be alleged against that averment in the record of the judgment, and against a verdict on an issue between the parties to the record in favor of the petitioners upon the very point of seisin? The verdict and the judgment in partition must surely be conclusive in an action of ejectment against the defence of adverse possession.

But again; suppose the premises, instead of being divided by the commissioners, should be sold under the 5th section of the partition act; must not the moneys raised by the sale be distributed among the parties to the petition? The direction of the act to distribute, when the owners are known, is express and general; there is no exception to it; and adverse possession would surely not be a sufficient bar to such distribution. The intention and direction of the act clearly is, that the money shall, in all cases of sale, be distributed among the parties whose shares and interests have been ascertained and determined, according to their rights as adjudged by the court; and the intention must, therefore, in my judgment, be that the parties must establish their rights to the seisin and possession of the premises, as well as the mere right, before judgment can be given for either a partition or sale of the estate; since the party having the possessory right vested in him at the time of the petition for partition must, upon any other construction of the act, lose the whole benefit, in case of the sale of the premises, of the statute of limitations for the protection of such right of possession. Was it not the obvious intention of the legislature in the 13th section of the partition act, to guard against its interference with the provisions of the

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statute of limitations ; and can any *construction of the act for the partition of lands be in accordance with that intention of the law-makers which does not effectually secure the party in possession against the loss of that protection which the statute of limitations would otherwise afford him ?

Now, the possessor who has held adversely for 20 years, has acquired a right of possession which the statute of limitations will protect against an ejectment or writ of entry. But a sale in partition, if authorised by the act, must divest him of that right, and take from him his possession, and he sustains an irreparable loss by the operation ; for his right of possession gives him no claim to the money raised by the sale. If, under other circumstances, any such claim could have been preferred, it is excluded by the judgment of the court, by which the title of the land, and the right of the proceeds of the sale of it, are adjudged to belong to another.

But again ; why should the party in possession be subjected to the vexation, trouble and expense of a suit for partition, by a claimant who is out of possession, before his right to the possession of the undivided part he claims is established ? If the judgment in partition is to be used against the party in possession, then the assailant will be furnished with a weapon against which the shield of the statute of limitations will be no protection ; and, if the judgment is not to be used, the claimant may be unable to recover the possession of the share set apart to him ; and the proceedings in partition would, in such case, be nugatory, and involve the party in possession in a useless and onerous charge. In the present case, if the petitioners are to be put to their writ of right after the partition, for the recovery of the part allotted to them, and the statute of limitations is to run against them to the time they bring their writ, considering that the adverse possession against them is admitted to have commenced as early as the 3d of May, 1803, and is claimed to be of anterior date and origin, they may be too late to recover on any *mise* to which they could entitle themselves. But if they are in time for

their remedy by writ of right, why should they be permitted to reverse the usual order of proceedings; and first to sue for partition of the undivided premises which are held adversely to them, and then to recover the possession of parts allotted to them on the partition against the adverse holder, instead of first establishing the right to the possession of the undivided shares they claim, and then suing for a severance of the possession between themselves and the other part owners? It is surely most consonant to the principles of justice, and the course of judicial proceedings, to require that a party who is out of possession, and especially after his entry is tolled, should first reinstate himself in his possession, and then sue for the partition of the estate: and I am satisfied that such is the intention of the act.

But it is said to have been decided by the supreme judicial court of the state of Massachusetts, that actual seisin is not necessary to maintain the statute process for partition; and the case of *Barnard v. Pope*, (14 Mass. Rep. 434,) is cited as the authority for the position. In that case there had been a sole possession for only ten years; there had been no actual ouster, nor any refusal to account for the rents and profits; and the court say that the right of entry remained at the time of filing the petition; and they held that under those circumstances, there was a sufficient seisin to maintain the process. In a previous case, in the same court, between *Bonner and others and The Proprietors of the Kennebec Purchase*, (7 Mass. Rep. 475,) it had been ruled that actual seisin in the petitioners was necessary to maintain the process for partition; and Chief Justice Parker distinguishes the case before him from that case, on the ground that the right of entry in that case was gone; but that in the case before him it remained. He admits the rule of the common law and the English statutes to be, that a writ of partition cannot be maintained by a tenant in common who has been disseised; but he takes the ground that the possession of one tenant in common is the possession of all; and that there must be overt acts of ouster, or a sole and exclusive pos-
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sion for more than 20 years, so that the right of entry is gone, before a disseisin is to be pronounced; but such possession, he admits, would conclude the party. That case, then, may be an authority to show that mere adverse possession, or the want of actual seisin, is not sufficient in that state to bar or *preclude a partition between tenants in common, who, in the absence of actual ouster, have a constructive seisin; but it is an authority also to show, that where the right of entry is lost, the process of partition is not maintainable.

The principle of that case, therefore, would protect the defendant in this; for, in this case, the right of entry was tolled by twenty years adverse possession. The case cited from Harris & McHenry's Reports shows that the same rule prevails in the state of Maryland; and that an adverse possession for 20 years is held by the courts of that state to be a bar to a partition. (2 Harris & McHenry, 254.) This case with those before cited to the same point, shows that the rule in England and in our sister states of Massachusetts and Maryland require a right of entry, at least, in a plaintiff or petitioner, to enable him to sustain the writ or statute process for partition. Our partition act is full as restrictive in its provisions, if not more so, than those of Massachusetts or Maryland; and it would seem strange, therefore, that our courts should allow greater latitude to the petitioners than the courts of those states.

On a bill for partition in chancery, an adverse possession of 20 years being interposed, the cause stand stand over for a trial at law.

In the court of chancery, which has an extensive jurisdiction in partition, and is in the habitual exercise of it, the course is to require that the title of the complainant be first established, before partition is decreed. An adverse possession for twenty years would be a fatal objection; and when interposed, must invariably stay the proceedings. The bill may not be dismissed; but the cause must stand over until the complainant establishes his right and recovers the seisin and possession at law. In analogy to the course of that court, the just and reasonable construction of the partition act would fairly admit, and I think requires, the same rule to be applied to the proceedings in the supreme court. The only difference is, that in equity, the bill, if filed, will

not be dismissed, but stand over ; but at law, the petitioner must clear the premises of the disseisin or adverse possession before he prefers his petition for partition ; and if he proceeds when his entry is barred, the petition will for that cause, when shown, be dismissed.

*But it is said by the supreme court to be the duty of that court to ascertain and determine the respective rights of the parties, and to give judgment that partition be made according thereto. The answer is, that that duty does not devolve upon the court until after the final determination of all the issues between the parties ; and is never to be performed unless those issues, which involve the right of the petitioners to partition, terminate favorably to them. After the issues of fact between the parties are settled by the jury, and the questions of law that may arise upon them are disposed of by the court, if the objections to the petition are removed, it does become the duty of the court to ascertain and determine the rights of the parties, and give judgment according to those rights. But the right to the partition is a preliminary question ; and may depend upon either the facts of the case or the law arising upon them ; and if any issue in law or in fact which may be taken upon that preliminary question, is decided against the petitioner, and is decisive of that question, his petition must be dismissed ; and no judgment of partition can be given. The error of the supreme court in this case appears to me to consist in their proceeding to judgment of partition on the petition. An issue of fact had been joined upon the seisin of the petitioners, which involved the right to a partition ; and the evidence on that issue was decisive against them. The verdict of the jury, it is true, is in favor of the plaintiffs or petitioners ; but that verdict was given under and in conformity to the charge of the circuit judge, before whom the issue was tried, to which the counsel for the defendants excepted.

The charge and exception both appear in the bill of exceptions. The circuit judge in his charge declared and delivered his opinion to the jury, that the matters produced and given in evidence on the part of the defendant below,

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(and who, as we have seen, proved an adverse possession for more than twenty years,) were not sufficient to bar the plaintiffs of their action; and the jury, in conformity to that direction, found a verdict for the plaintiff; and the defendant's counsel excepted to the opinion of the court, and insisted on the said matters as bar to the action. The correctness of the charge and opinion of the circuit judge, on which the validity of the verdict depended, was the point brought before the supreme court, by the bill of exceptions, for decision; and that court determined that the verdict, notwithstanding the exception of the defendant, was not erroneous or improper; but that it was good and valid in law.

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Such is the history of the case upon the record. That record refers to a stipulation, whereby the fact appears to be that the case never was in truth passed upon by the jury; but that a case was made for the opinion of the supreme court, with liberty to turn it into a bill of exceptions or special verdict; and that after the judgment of the supreme court upon the case, in favour of the plaintiffs, it was turned into a bill of exceptions, for the purpose of bringing it before this court. To the opinion of the supreme court, then, we are to look for the grounds of the judgment, and for an explanation of the charge or opinion to the jury appearing by the record to have been delivered. We there find the court distinctly to admit, that the defendant's possession was adverse for more than 20 years; and that the possessory right of the plaintiffs was gone; but that such adverse possession did not support the issue on the part of the defendant because the plaintiffs had a remedy by writ of right, and were therefore entitled to partition; and if this opinion of the supreme court, as given in the reasons for the judgment and put upon the record, was correct, then the further duty of that court clearly was, to proceed to ascertain and determine the rights of the parties, and render judgment of partition; but if they erred in their opinion, and the verdict ought to have been set aside, then they mistook their duty, which, in such case, was to award a new trial of the issue. That is the question now

before this court ; and if the adverse possession and possessory title of the defendants did disprove the plaintiff's allegation of seisin, it maintained the issue on the part of the defendant, and the jury ought to have been charged to find a verdict for him.

But it is objected that the question of adverse possession was for the jury and not for the court to decide ; and that the verdict of the jury set forth in the bill of exceptions, being "in favor of the plaintiffs below on the issue, is conclusive against the adversity of the defendant's possession. To this objection the record itself gives an answer which I have already noticed, and deem sufficient. It was a verdict given under and in conformity to the opinion of the judge ; and its efficacy depends on the soundness of that opinion. The fact of adverse possession, or in other words, whether the premises have been held by the defendant as his own against the claim of the plaintiff, is a question for the jury ; but the evidence adduced on the trial to establish or disprove that fact often involves points of law which the court is to decide ; and the duty of the judge is to submit the questions of fact to the jury under his direction and opinion on the questions of law which the evidence before them may involve. In the present case, independently of the stipulation of the parties, to which we cannot shut our eyes, it sufficiently appears from the record itself that the verdict was given in conformity to the opinion of the court expressed in the charge, and did not result from the deliberations of the jury upon the evidence. The record, though not so full as would be desirable, discloses enough to show that this course was substantially pursued. In strictness, the charge should have been, that if the jury, from the evidence, should find that the possession had been adverse to the petitioners for more than 20 years, then the defendant below was entitled to a verdict ; but the direction, as stated in the bill of exceptions, is different. If an opinion had been expressed upon the result of the evidence, that opinion, as the supreme court declare in the reasons they assign for their judgment, must have been that the evidence did establish an adverse possession for upwards of twenty

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Whether there be an adverse possession, is a question of fact for the jury ; but the trial of such possession often involves questions of law which the court is to decide ; and in such case, the judge should submit the question of fact to the jury, with his directions as to the law involved in the evidence.

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years. Yet the charge stated on the record is, that the evidence is not sufficient to bar the plaintiffs' action. The court then expressed an opinion to the jury, upon the whole evidence, in favor of the plaintiffs against the defendant; and the jury, if they adopted that opinion, as they must be presumed to have done, were bound to find for the plaintiffs. The evidence on which that opinion was expressed is brought up to this court by the bill of exceptions; and the reasons of the supreme court for their opinion are before us, and I am constrained to say that, in my judgment their opinion was erroneous.

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A verdict can not be reversed on error as being against the weight of evidence; but will be reversed for a wrong direction by the court to the jury on a question of law, or the legal result of the evidence.

It is certainly true, as was contended on the argument, that a verdict cannot be reversed in this court, as being against the weight of evidence; and when the jury are left free to exercise their own judgment, their decision on questions of fact, though subject to review in the court where it is given, is conclusive here. [1] But if the judge interposes an opinion, or gives a direction on a point of law, or on the legal results of the evidence, the jury are to act under its influence, and if erroneous, the verdict will be vitiated by it; and when regularly brought up by writ of error from the judgment of the supreme court upon it, may be set aside for that cause in this court.

In *Doe v. Prosser*, (Cowper, 217,) it is laid down by the court, that the jury, after twenty years' adverse possession, is to find an ouster; and in the case of *Ricard v. Williams*, (7 Wheaton 59,) similarly circumstanced with this, where one of the heirs of the ancestor entered claiming, not as heir, but under a distinct title, kept the exclusive possession, and held out the other heirs, until the right of entry was barred by lapse of time, the court held, that the jury ought to have been instructed, that if they were satisfied that the defendant's possession was adverse to that of the other heirs, under a claim of title distinct from, or paramount to that of the ancestor, during his period of exclusive possession, which in that case was 25 years, the entry of a purchaser under a sale of the estate as the property

[1] *Oakley v. Van Horn*, 21 Wen. 305.

of the ancestor, was not congeable; and because the jury were not so instructed, the circuit court had erred, and the judgment was reversed.

So in this case, the evidence clearly showing an adverse possession for more than 20 years, the verdict of the jury upon the issue ought to have been for the defendant; and the jury ought to have been charged, that such adverse possession, if proved to their satisfaction, was sufficient in law to bar the plaintiffs' entry, and to entitle the defendant to a verdict; and the opinion of the court as stated to the jury, that the evidence was not sufficient to bar the action was, according to my views of the law, clearly wrong; and the judgment of the supreme court, founded upon the verdict given in conformity to that opinion, ought to be reversed, and a new trial of the issue awarded.

Per totam curiam.

Rule accordingly.

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Where in a proceeding for partition, there is evidence of a possession for 20 years before suit, adverse to the petitioner, the jury should be instructed that

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if they find such adverse possession, proved to their satisfaction, they should render their verdict for the defendant.

HENRY B. LAMBERT, plaintiff in error,

against

THE PEOPLE OF THE STATE OF NEW YORK, defendants
in error. (a)

An indictment for a conspiracy was, that the defendants, intending unlawfully, by indirect means, to cheat and defraud a certain incorporated company (naming it) and divers others unknown, of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons, of their effects; and that, in execution thereof, they did, by certain undue, indirect, and unlawful means, unlawfully cheat and defraud the company and unknown persons, of divers effects. The court for the trial of impeachments and the correction of errors being equally divided on the question, whether this was a valid indictment, it was

(a) My minutes do not tell when this case was decided. It was first argued at the June session of the court, 1827. September 15th, 1827, several opinions were delivered in the cause; but the court ordered a re-argument, which took place on the Monday following. The cause was afterwards decided in the autumn of 1827, or the winter of 1827-8.

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decided by the casting vote of the president, that it was defective; and the judgment of the supreme court sustaining it was reversed.

Where an indictment for a conspiracy does not set forth the object specifically, and show that such object is a legal crime, it should particularly set forth the means intended to be used by the conspirators; and show that those means are criminal. Otherwise, it charges no crime which the law can notice.

Where such a fraud as may be punished criminally is actually committed by several persons, in pursuance of a conspiracy between them for that purpose, the conspiracy, as such, is not indictable, but the fraud only. *Per SRENCER, Senator.*

Whether an indictment lies for a conspiracy to produce a mere private injury which is not a legal crime, and would not affect the public, nor obstruct public justice? *Quere.* *Per SRENCER, Senator.*

An indictment charging generally, that the defendants conspired to defraud an individual, and not showing the intended means by which the fraud was to be compassed, is bad.

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*Provisions in the new revised laws (pt. 4, ch. 1, tit. 6, § 8, 9, 10,) on the subject of conspiracy, with the reasons in their favor as rendered by the revisors. By these provisions, conspiracies to commit any offence; falsely to charge another with, or arrest, or indict him for, an offence; falsely to move or maintain a suit; to defraud another of property by criminal means, or by means which, if executed, would amount to a cheat, or obtaining goods, &c. by false pretences; or to commit any act injurious to the public health or morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws, are misdemeanors; and such only are indictable. And no agreement, except to commit felony on the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act be done beside the agreement, by one or more of the conspirators. Note (b) at the end of the case. English and American cases and authorities cited, stated and commented upon in reference to the following questions. Whether a conspiracy to commit a private fraud, or a fraud upon a private individual, or any other wrong not punishable as a crime, be indictable, and in what cases; whether a conspiracy to commit a fraud on an insurance corporation, or other corporation for the public benefit, be indictable, the means in each case not being other than the mere act of conspiring; whether charging by indictment, simply a conspiracy to cheat, without saying what kind of cheat, imports a cheat punishable criminally; whether in charging a conspiracy to commit either a civil or criminal fraud, it be necessary to set out the means beyond the act of conspiring; and whether a conspiracy to commit a crime shall be said to be merged or absorbed by being carried into effect. *Per STEBBINS, Senator.*

Every indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted. An indictment for common barratry is an exception; and a bill of particulars is required. Why indictments of common scolds, houses of ill-fame, common nuisances, &c. are exceptions. *Per SRENCER, Senator.*

At common law, an indictable cheat was such only as affected the public; such as common prudence could not guard against. The law was altered and extended, by statute, to all cheats by false pretences. In all cases, an indictment for a cheat must set out, particularly, the false token or pretence. Per *SPENCER*, Senator, concurred per *STREBINS*, Senator.

In chancery a defendant (like witness at law) is not bound to answer to facts which may criminate or subject him to a penalty. He may demur to the discovery; but this does not affect the relief. Per *STREBINS*, Senator.

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ON error from the supreme court. The record upon which the cause was discussed and decided here, is given at large, and *verbatim*, in 7 Cowen's Rep. 166, S. C., by the title of *H. B. Lambert against The people*.

The reasons for the judgment below were, some time after the decision of the cause there, rendered by the chief justice, and printed for the use of the court of errors, as follows:

**SAVAGE*, Ch. Justice. The defendant below was indicted with others in the general sessions of the city and county of *New York*, for a conspiracy to defraud certain incorporated companies and certain individuals, of their goods, chattels, and effects. The indictment was sent into the oyer and terminer, where the defendant was convicted of the offence charged in the indictment. A writ of error has been brought into this court, to reverse the conviction. Several exceptions have been taken, some of them relating to matter of substance, and others to matter of form.

1. It is contended that a conspiracy to defraud an individual of his goods and chattels and effects, is not indictable at common law. This was the last point made by the counsel for the plaintiff in error, but it seems to me proper to be first discussed.

There are, no doubt, many acts which, when done by a single person, are not criminally cognizable by law, but which become so when effected by the combination and confederacy of several persons. All confederacies wrongfully to prejudice another, are misdemeanors at common law, whether the intention is to injure his property, his person or his character. (3 Ch. Cr. Law, 1139. Hawk. b. 1, ch. 72, s. 2.)

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It was contended, upon the argument, that a conspiracy to cheat is not indictable, unless it has for its object a fraud upon the public. This is not the true distinction, though it must be conceded, and indeed is conceded by writers on criminal law, that the point at which the combination of several persons in the same object becomes illegal, is left doubtful. (3 Ch. ubi supra.)

It is only by comparing the present case with previously adjudged cases, that we can determine whether the offence falls within any general principle deducible from those cases.

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Mr. Archbold, in his treatise on pleading in criminal cases, p. 390, defines a conspiracy to be an agreement between two or more persons : 1. Falsely to charge another with a crime punishable by law ; 2. Wrongfully to injure or prejudice a third person, or any body of men in any manner ; 3. To *commit any offence punishable by law ; 4. To do any act with intent to pervert the course of justice ; 5. To effect a legal purpose with a corrupt intent, or by improper means ; 6. Combination by journeymen to raise their wages. Under the second general head, he specifies a conspiracy to exchange pretended wine for goods, and several other cases ; and also, cases, in which conspiracies have been held not indictable ; as to kill game, or any mere civil trespass. (Arch. Cr. Pl. 390, 1.)

The case of *Regina v. Mackarty and Fordenbourg*, (Ld. Raym. 1179,) is the case of the wine already mentioned. The offence laid was, an agreement to barter, sell, and exchange a certain quantity of pretended wine as good and true new Lisbon wine, for a certain quantity of hats. The defendants were convicted, and on a motion in arrest, several exceptions were taken ; but it was not contended that the offence, if properly laid, was not indictable. It was contended that the indictment was uncertain, and so the court seemed to think upon the argument ; but judgment was afterwards given for the queen.

The case of *The People v. Barret and Ward*, (2 Caines, 100, 304, and 1 John. 66,) was a case of conspiracy to cheat an individual of "his money, goods and chattels."

The case was several times before the court. The points raised were discussed with great learning and ability ; but it was not made a question whether a conspiracy to defraud an individual of his property was an indictable offence.

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From the above cases, and many others cited by Archbold and Chitty, but which I deem it unnecessary to state at large, I think there can be no doubt that the offence charged is punishable by indictment.

2. Exceptions have been taken to the sufficiency of the indictment, which, in my judgment, are answered by the decisions which adjudge, that in indictments for a conspiracy, the same certainty is not required as in other cases. An indictment for conspiracy to defraud a person "of divers goods" has been held sufficient. (Archbd. 18, 391. 3 Burr. 1320.) In the latter case, the indictment charged the defendants "with wickedly and unlawfully conspiring to accuse J. C. of taking hair out of a bag. The court held the indictment sufficiently particular. They said that the gist of the action is the unlawful conspiracy to injure the man by this false charge.

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3. Exceptions have been taken also to the form of the record. A record should contain a true history of the proceedings in a cause. In criminal cases, particularly in outlawry, judgments have been reversed for trivial causes. The cases were seldom argued, and judgment was often reversed for no error at all, as the means of extending the mercy of the crown. (1 Ch. Cr. L. 752.)

In the case of *Rex v. Wilkes*, (4 Burr. 2527 to 2565,) there was much discussion upon a writ of error brought to reverse an outlawry. The outlawry was reversed because the sheriff, in the proclamations, was not sufficiently particular. The sheriff stated that they were made "at the house, &c., in Brook-street, near Holborn, in the county of Middlesex." One objection was, that it did not appear that Brook-street was in the county of Middlesex ; but this was held sufficient. But the sheriff had said in his return, "By virtue of this writ to me directed, at my county court, held at the house known," &c. It was held that the sheriff, after the words *my county court*, should have added the

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name of the county, and after the word *held*, should be added for the county of Middlesex. And for these errors, the outlawry was reversed, purely upon authority, and upon the authority of the cases already referred to, in which there was no opposition, and when the reversal was desired by the crown; authorities "begun," as Lord Mansfield says, without law, reason, or common sense." He says that the ancient authorities in Dalton were otherwise; but the late cases were in favor of the reversal, and therefore the judgment was reversed. If I were to admit that we are to be bound by a decision, based on neither law, reason, nor common sense, I would certainly confine it to the precise case, the case of outlawry, and for the precise errors. But this case is not analogous in one important particular. In England, the same person may be sheriff of two different counties; but the recorder and aldermen of New York cannot hold a court for any county but the city and county of New York. But the record is even technically correct, when describing the trial. As to the names of the jurors, it seems to be settled, that though the names of the grand jurors must be returned upon the return to the *certiorari*, yet they need not be stated in the record in the court in which the *certiorari* is returnable. (1 Saund. 249.)

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It is also objected that the past tense is used instead of the present, saying it *was* presented, when the proper expression would have been *is*. The answer is, that the clerk is giving a history of what took place antecedently, and therefore properly speaks in the past tense.

Another objection is, that no rule or order of the sessions is shown, transmitting the indictment from the inferior to the superior tribunal. I cannot think the want of such a rule, error. The usual practice, as far as I know, has been for the sessions to send such indictments as should properly be tried in the oyer and terminer, by the district attorney, who is an officer of both courts; and though more properly, an order or rule for that purpose should be made, I cannot agree that such rule shall be absolutely necessary to confer jurisdiction, when both the indictment and the defendants

are before the higher tribunal ; the indictment being sent by the sessions and received by the oyer and terminer, in the language of the record, and the defendants appearing upon recognizance entered into before the sessions, and returnable in the oyer and terminer.

But it is said the defendants were not in gaol. It is not necessary they should be in gaol to give the oyer and terminer jurisdiction. By the act, (1 R. L. 341, sec. 21,) the oyer and terminer has power to try all indictments from the sessions against prisoners in gaol, and such other indictments as said court shall think proper to try. The act 2 R. L. 508, sec. 10, makes it the duty of the sessions in New York to send all indictments against persons in gaol, which have not been heard and determined, to the next oyer and terminer ; but this act takes away no jurisdiction conferred by the former act. I have noticed the principal points made by the plaintiff in error, and am led to the conclusion, that no cause is shown for reversing the judgment in this cause.

*The case was twice argued here. The first argument went upon the following points :

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I. The indictment is too *general*. The *names* of the *conspirators*, the *names* of the *individuals conspired against*, and the kind of *goods, chattels, and effects* which were the object of the conspiracy, and the means by which they were to be obtained, should be stated in the indictment.

1. That the court may know that the grand jury have gone upon sufficient premises in finding the bill.

2. That the defendant may be able to plead a former conviction, acquittal or pardon, for the same offence.

3. That the court and jury may know that they are trying the *same offence* for which the grand jury indicted.

4. That the defendant may know with certainty the offence charged, and be prepared to defend against it on the trial.

II. The overt acts of conspiracy charged, do not help out the indictment by specifying the particular things obtained by the conspiracy : *because*,

1. The overt acts are not a part of the crime, which is

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complete when the conspiracy is formed, having for its object something definite.

2. Overt acts, if *charged*, need not be *proved*.

3. If proved, need not be proved as charged.

4. The evidence of overt acts only serves to enhance the punishment, and may be given before or after verdict.

III. *Bills, bonds, notes, mortgages, &c.* specified in the overt acts charged, are not the subject of an indictable conspiracy.

1. Conspiracy, in its most extended sense, is a combination to injure a man in his *person, reputation, or property*.

2. Conspiracy being a common law offence, a conspiracy to defraud a person of his *property*, must be of such things as were considered *property at common law*.

3. *Bills, notes, mortgages, &c.* at common law are not property; are at most the mere evidence of property; and the possession of such evidence of property could not benefit any one but the lawful owner.

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*IV. The record is defective: *because*,

1. There is no court of general sessions with the powers described in the caption.

2. The names of the grand jury do not appear in the caption.

3. The presentment of the grand jury is in the *past* instead of the present tense; it *was* presented, instead of it *is* presented.

4. The defendant *not being in gaol*, the sessions were not authorized to *send* the indictment to the oyer and terminer.

5. There was not an *order of sessions entered* to send the indictment to the oyer and terminer.

6. The oyer and terminer had no evidence that the indictment *came from the sessions*. It does not purport to have been presented at the sessions.

7. An indictment found at the sessions and sent to the oyer and terminer for trial, must be tried at the *next* oyer and terminer, or remitted to the sessions.

8. The oyer and terminer was *not properly formed*, as the mayor or recorder must always be one of the court.

9. The oyer and terminer is described as held at the *city hall, &c.*, without adding *in and for the city and county of New-York.*

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10. No new venire could issue, unless the sheriff return the first *not executed*, or *omit to return it.*

11. The *quia tam* in the award of venire is omitted.

12. There is no appearance of *defendant* or *district attorney* after venire returned, until after verdict pronounced

V. A conspiracy to defraud an individual of his *goods, chattels, and effects*, is not indictable either under the statute, (1 R. L. p. 173, s. 3, *which defines the crime of conspiracy*,) or at common law. The only conspiracies that are indictable are:—

1. Conspiracy to commit *crime*; as conspiracy to commit theft; to obtain goods by false tokens, &c.

2. Conspiracy to do an act affecting the *public*; as a conspiracy among journeymen not to labor without a certain price.

*3. Conspiracy to pervert the course of justice in a judicial tribunal.

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4. Conspiracy to charge an *individual* with something of a *criminal nature*—as a conspiracy to charge him with theft; with being the father of a bastard child, &c.

The case was argued on all these points, by

D. B. Tallmadge, for the plaintiff in error.

Maxwell (District Attorney of the city and county of New-York,) and *Talcott*, (attorney-general) for the defendants in error; and

J. Tallmadge in reply.

I was not present at the second argument; and therefore cannot report what was urged by counsel on that occasion; and I do not report the first argument, beyond the points made by counsel, because, on examining my notes, I find all which was then urged by them, so far as it respected the points now examined by the judges, very fully comprehended in what was said by the two learned senators

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(Spencer and Stebbins) who delivered the leading opinions here, the one for reversal, and the other for affirmance of the judgment below.

Every man is, in an indictment, entitled to a specification of the charge against him.

SPENCER, Senator. The first point which I shall examine in this case is, the objection that *the means* by which it was intended to accomplish the conspiracy, are not set out in the indictment. The general principle that every man is entitled to a specification of the charge against him, is so deeply engrafted into our criminal law, and is so essential to the enjoyment and protection of personal liberty in a free country, that it must be a waste of time to enforce it by argument or authority. The rule, founded upon this principle, as given by an excellent modern writer on criminal law, (Mr. Chitty, in his 1st vol., p. 169,) is, that "every indictment must contain a description of the crime of which the defendant is accused, and a *statement of the facts* by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the party be put upon his trial for another, without any authority." This simple and plain rule is so agreeable to common sense and common justice, that it needs not any authority to support it. But authorities are abundant, and it may safely be assumed as universal. The *apparent*

Exceptions. exceptions are few. One of them is the case of an indictment for being a common barrator, in which, from the difficulty of specifying particular instances on the record, a generality of form is allowed; but the evil is remedied by the court's requiring from the prosecutor a bill of particulars of the instances of barratry intended to be proved on the trial; so that, in truth, even this case is not an exception to the rule. The cases of indictments against common scolds, houses of ill-fame, common nuisances, &c., partake of the subject, and must necessarily be as general as that is, and do not contravene the rule.

In order to apply the rule to the present indictment, it becomes necessary to strip it of all unnecessary verbiage, and see precisely what it is. The following is a careful abstract of it; "That the defendants, intending unlawfully by indirect means to cheat and defraud a certain company

Abstract of
indictment.

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and divers others unknown, of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the said company and unknown persons of their effects; and that in execution thereof, they did by certain, undue, indirect and unlawful means, unlawfully cheat and defraud the said company and unknown persons of divers effects." This is the whole bone and substance of it. Is this, in the language of the rule, "a *certain* description of the crime of which the defendants are accused?" Is it "a statement of the facts by which that crime is constituted?" Does it "identify the *accusation* so that the party cannot possibly be tried for any other offence than that which was before the grand jury that found the bill?"

It is agreed by all that there are two kinds of conspiracy, into one or the other of which, all offences of that description may be divided. The *first*, where the conspiracy is to commit a criminal act, in which case it is immaterial by what *means* the object is to be accomplished; *second*, where it is to commit an act, not criminal in itself, by criminal means. Here the object is immaterial, and the illegality of the means used or intended to be used, constitutes the offence. In the first case, it is the nature of the *object*; in the second, the nature of the *means* by which the offence is ascertained.

The *object* stated in this indictment, is, "by wrongful and indirect means to *cheat and defraud* the company and unknown persons." But all cheats are not criminal. Many acts which would be denounced as cheats by the principles of morality are not legally cheats. Thus where a person got possession of a promissory note by pretending that he wished to look at it, and then carried it away and refused to return it to the holder, this was held, in the case of the People v. Miller, (14 John. Rep. 372,) a mere private fraud and not punishable criminally. To determine, then, whether the object stated in this indictment was in itself criminal, it becomes necessary to ascertain what *cheats* are criminal. At the common law, it must be such a fraud as would affect the public or as common prudence

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Two classes
of conspiracy:
1. Where the
object:
2. Where the
means are
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Object charged
here, is a
cheat.

All cheats not
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are criminal.

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How the crime
of obtaining
goods, &c. on
false pretences
should be
charged

2 T. R. 586,
E. C. L. 837.

Indictment in
question does
not set out
false pretences.

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In an indict-
ment for a
cheat at com-
mon law, the
false token
must be set
forth.

Conspiracy
here not crimi-
nal by reason
of its object.

cannot guard against; as by using false weights, or by some false tokens. (3 Chitty's Crim. Law, 399. 2 Strange, 1127. 7 John. Rep. 201.) A statute was passed in England in the 30th year of Geo. 2, and a similar one in this state, (1 R. L. 410,) extending the offence, and punishing those "who knowingly and designedly, by false pretence, obtain any money, &c., with intent to cheat and defraud." Under this statute, the offence consists in the false pretence, and it has been universally held and never questioned by any court, "that in an indictment upon that statute, it is not enough to allege generally, that the cheat was effected by divers false pretences, &c.; but the particular false pretences must be stated, that the party may know against what he is to defend himself; and that the court may see that there is an indictable offence charged, as there are some pretences which are not within the statute." [1] I quote the very words of the authorities. (2 Term Rep. 586. East's Crown Law, 837.) This indictment does not set out the false pretences by which the cheat was to be effected. This court, then, has not the means of determining whether it was "such a cheat as comes within the statute. We are bound by the record: we cannot look beyond it; and if that does not furnish all the ingredients to constitute a crime, it is impossible for this court to supply them. We cannot see, then, that here there is an object for the conspiracy charged, which, if attained, would have been criminal *under the statute*. Nor would the object here charged be criminal at common law; for it is as firmly established as any rule can be, that the *false token* must be set forth, in an indictment for a cheat at common law. That is not done. There is, therefore, on this indictment, no criminal act charged as the object of the conspiracy. The conspiracy, then, was not criminal by reason of its *object*, and does not come within the first class. Was it an offence by reason of the unlawful *means* used, or intended to be used; and therefore within the second class?

[1] See *People v. Gates*, 13 Wen. 311. *People v. Haynes*, 11 Wen. 557.

This question we are utterly unable to answer by an inspection of the indictment; for it does not set forth the *means*; so that this court cannot determine whether they were lawful or unlawful. In the language of the rule before quoted, I ask, is this "a statement of the facts by which a crime is constituted?" The crime is constituted by unlawful means, and no means whatever are specified. Had not authorities been quoted, contrary to this very plain and obvious conclusion, I should leave this question here, to rest upon what appear to me the plainest dictates of common sense. But it is contended, that in this peculiar case of conspiracy, it is sufficient to allege generally that it was to be accomplished by unlawful means, and some cases are cited. I am in possession of a report of the decision of the court of appeals in Maryland, on the conspiracy cases tried in that state in 1823, (1) in which every case that has ever been decided, bearing in the least on the law upon this subject, is minutely stated and examined; and from a comparison of most of them with the original reports, I am persuaded they are correctly *stated. Out of twenty-one cases there quoted, in nineteen the *means* by which the conspiracy was to be effected, are charged. A brief statement of them seems necessary, to show the uniform and almost uninterrupted current of authority on this point. (The cases referred to were here severally quoted and commented on by the learned senator.)

To these may be added the case of the People *v.* Barrett & Ward, (1 John. Rep. 66,) where the means alleged are, that the defendants passed to *O. D.* a note of one Medad Gun, and falsely affirmed that Gun was solvent. Against this mass of authority, and a greater and heavier mass, I venture to assert, cannot be produced in favor of any other legal position, there are two cases cited. The first is that

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The indictment in question does not set forth the means; it cannot be seen they were criminal; and the indictment is therefore defective, the contemplated fraud not appearing to be criminal.

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(1) This case is reported in 5 Har. & John. Mar. Rep. 317 to 368. It was decided on demurrer to the indictment, which was, in substance, like the present one, (except that the *means* were set out.) The indictment was unanimously sustained by the supreme court of appeals in Maryland. Vid. post, opinion of Stebbins, senator.

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Rex v. Eccles,
(1 Leach, 274.)

Rex v. Turner,
(13 East, 228.)

of *The King v. Eccles*, (Leach, 274,) in which the charge was that the defendants conspired, *by wrongful and indirect means*, to impoverish Booth, and prevent him from exercising his trade of a tailor. Lord Mansfield held, that the offence consisted in "conspiring to effect the mischief by any means; the means may be perfectly indifferent." The answer to the applicability of this case, is given by Lord Ellenborough, in the case of *Turner*, (13 East, 228,) who says, "the case against Eccles and others, was considered a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." This, then, was a case within the first class, where the offence consists in a criminal object, and then, indeed the means are "perfectly indifferent." It has no application to the second class, where the offence consists in the means used.

Rex v. Gill &
Henry, (2 B.
A. 204.)

The other case is that of *The King v. Gill & Henry*, (2 Barnwell & Alderson, 204.) The indictment was as general as the present. It charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain the monies of P. D. & G. D.; and it was held sufficient. This was decided in 1818, and is of course no authority here. It is no more than the opinions of respectable lawyers, on the other side of the Atlantic; and derives its whole force from the reasons given in its support. The reason assigned by Ch. J. Abbot is, that there may be a possible case of conspiracy, when the means of accomplishing it are not agreed upon by the conspirators; and therefore there may be cases where those means cannot be set out. Referring again to the great division of conspiracies, it is admitted that there may be a case of conspiracy of the first class, where the object itself is criminal, in which the *means* of accomplishing it are perfectly indifferent, and need not be agreed upon. But the second class is that where offence depends on the *unlawful means*, and of course the offence cannot be complete, without those means are used or agreed to be used. The remark of Ch. J. Abbot is true; but it is not applicable to the case. To illustrate the distinction: it is an offence to steal, but it is

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not an offence to obtain property by a fraud which does not amount to a false token or false pretence. If B. and A. agree to steal, the offence of conspiracy is complete, and the means need not be set forth. If they agree to obtain 20 pounds of flour in a barrel more than they ought to have, by the use of a false weight, then it becomes criminal in consequence of the means agreed on. They might have agreed to obtain it by improper means, but which were not criminal. They of course could commit no offence until the idea of crime, either in the *object* or by the *means*, entered their minds; and then the act of agreeing, would be an overt act towards the consummation of the offence; that is, the act of agreeing to those means; and of course there cannot be a possible case of the second class, unless the unlawful means are agreed upon. I have already endeavored to give the reasons which satisfy me that the present is a case of the second class. In order to show more conclusively that the remark of Ch. J. Abbott is not applicable to it, I again recur to the *reason* given for the rule of the requisites of an indictment, "that it must contain a statement of the facts by which the crime is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the party be put on his trial for another, without any authority." It seems agreed that the offence consists in the unlawful means; those means then were proved to the grand jury. Suppose they consisted of false entries in the books of the company; upon this indictment, how is the court to know that such "were the means proved, and for which the grand jury said the defendants should be put on their trial? or take any other possible case which would justify the finding of a bill; what means have the court to determine whether the public prosecutor proves the same facts on the trial that he proved before the grand jury, or any facts at all like them? How can the accusation be identified; that is, ascertained to be the same that was laid before the grand jury, and is presented for trial? The indictment says, "by wrongful and indirect means." Is this an identification of the accusation?

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There is another reason, equally strong, why the means should be set forth; it is, that the court may judge whether there is an indictable offence charged. This is a sacred right of the citizen, and when deprived of it, he is deprived of one of the greatest bulwarks of liberty. In the hurry of business a judge may mistake as to the lawfulness of the means employed to effect a conspiracy, if it rests only in evidence; but if they are spread on the record, a writ of error submits them to a more deliberate judgment.

But perhaps a stronger reason than any other, arises from a consideration of the great injustice which may be perpetrated by means of such indictments. What kind of notice does a defendant receive of the charge against him, by reading an indictment, that says he conspired by indirect and unlawful means to defraud some unknown persons? For it cannot be denied, that under this indictment the defendants might have been convicted of a conspiracy to defraud a man in Kamschatka. How are they to prepare for their defence? Would not a copy of the decalogue be as useful to point out the particular offence for which they are to be tried? It would be in vain that they should ransack their memories; for an innocent man would be the least likely to suspect the transaction for which he is to be implicated.

Such a practice violates the fundamental principle of our criminal law, that no man shall be twice tried for the same offence. That principle has no value, unless the accused is apprised of the charge against him, that he may show a former acquittal. Let us suppose a defendant going to trial on such an indictment as the present. He has already

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been *tried for a conspiracy and acquitted; until the moment arrives when the public prosecutor opens his testimony on the trial, the defendant has no means of knowing for what he is to be tried. At such a time what means has he of adducing the evidence of the former trial? I cannot believe that our criminal law is chargeable with such gross injustice. It has been framed and matured in wisdom, and in mercy. It exults in the belief that every man is inno-

sent until proved guilty ; and it glories in affording to the accused every possible means of vindicating his innocence. It scorns the rack and every species of torture ; it disdains trick and circumvention, and invites to an open, full and fair investigation of the offence. Such indictments as that now under consideration, are, in my judgment, directly hostile to these great features of our criminal law. They open the way to general and indefinite charges ; they surprise the defendant, they afford no means of determining whether they have been legally found, they deprive the accused of the right of reviewing them, and they leave him at the mercy of a public prosecutor. If there were fifty precedents in England, instead of one solitary case against nineteen, and that not applicable, I should be prepared to say that the spirit of our institutions was directly at variance with such indictments ; and that they ought not to be sustained in a country which regards every citizen as composing a part of its sovereignty.

The view I have taken upon the question discussed, disposes of this case. But there are others which have been presented, and which it would seem a duty briefly to notice.

It is urged that this indictment charges an executed conspiracy ; that the first agreement to commit the offence and every other preliminary and intermediate step, is absorbed in the actual commission of it. I am deeply impressed with the weight of this objection. I cannot conceive how a crime can be split up into its several parts, and each of those parts made subject of accusation. If a man committed a theft by robbing, I cannot understand how the two can be separated, and the defendant tried for the theft alone. An indictment for murder always charges, that the defendant made an assault *on A. B. and him murdered with malice aforethought. If a general verdict of guilty were rendered on such an indictment, would it enter into the head of any man to inflict a punishment merely for the assault ? That assault is a part of the crime and is absorbed in it. So in this case, the agreement to cheat, the false tokens or false pretences used, are all concentra-

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The indictment is defective as charging an executed conspiracy, viz : a cheat. An indictment for a cheat must always set forth the means used to defraud.

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ted and collected in the offence of cheating. I do not mean to say, that where there are several counts in an indictment, in some of which a conspiracy only is charged, and in others the attainment of the criminal object is alleged, the public prosecutor should not be permitted to sustain which count he could by evidence. In such a case, the verdict would remove all difficulty; for if the object had not been attained, and a cheat had not been effected, the jury would acquit the defendants on those counts, and find them guilty on the counts for the conspiracy only. But here there is but one count, which alleges that the cheat was accomplished, and the jury have found that allegation to be true. In fact, then, this indictment is not for a conspiracy, but for a cheat. This view receives conclusive authority from the judgment of the supreme court of Massachusetts, in the case of the Commonwealth v. Kingsbury and others, (5 Mass. Rep. 106,) where it is said, "had the conspiracy not been effected it might have been punished as a distinct offence; but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offence distinct from the felony, because the contrivance is part of the felony when committed pursuant to it. The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offence."

I do not understand this decision to rest on the doctrine of *merger*, which exists when two offences of different degrees have been committed at the same instant and in prosecution of the same object; but it is on the ground, that the previous acts are all absorbed in the offence; for Ch. J. Parsons expressly puts the case of a conspiracy to commit a misdemeanor, which is itself a misdemeanor, and therefore, not within the technical idea of *merger*. But cheating by false pretences, is with us, an offence of a higher grade than a misdemeanor; (2) for it is punishable by

Com. v. Kings-
bury (5 Mass.
Rep. 106.)

(2) It would seem to be a very high crime or misdemeanor, though not a

imprisonment in the state prison for three years; while a misdemeanor, in which class conspiracies are included, are punishable only by fine and imprisonment in the county gaol. The technical doctrine of merger, might, perhaps with propriety, be applied to this case.

The reason, however, on which the doctrine is founded, is equally applicable to the case where the offences are of the same grade. That reason is presumed to be, that if a man were indicted and convicted for a conspiracy to do an unlawful act, and was punished; if he should afterwards be indicted for doing the act itself, he could not plead the former conviction in bar, because it could not be for the same matter. And thus a citizen might be repeatedly put in jeopardy for the same offence, against a fundamental principle of our criminal law, consecrated and sanctioned by our constitutions.

Considering this, then, as an indictment for a cheat, consummated, we are to enquire whether it is sufficient as such. The authorities before cited from 2 T. Rep. 586, and East's Crown Law, 837, to which may be added 3 Chitty's Criminal Law, 999, and 2 Str. 1127, abundantly establish that an indictment for cheating, either at common law, or under the statute, must set forth the false tokens, the false pretences, or other means by which the cheat was effected, "that the party may know," in the language of the court, "against which he is to defend himself, and that the court may see there is an indictable offence charged; as there are some pretences [and some tokens and various means] which are not within the statute." This view, if correct, is entirely decisive of the question respecting the sufficiency of this indictment; for it does not purport or pretend to set out any false tokens, any false pretences, or any particular means by which the cheat was effected. I venture

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felony. (1 Hawk. P. C. B. 1, ch. 23, § 1 to 7, inclusive. 1 B. L. 410, § 13.)

It appears to be a *felony* by the new definition of that word, (N. E. L. pt. 4, ch. 1, tit. 7, § 30;) for it is punishable in the state prison, (id. ch. 1, tit. 3, art. 4 § 53,) which is made the criterion of felony, after the new statutes go into effect, which will be in 1830.

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to assert that there is not a case or precedent to be found in the whole course of English or American authorities, which would sustain this indictment as for a cheat. That it is for a cheat has been shown. But whether it be considered as an indictment for a cheat or for a conspiracy, the same objection, and for the very same reasons, applies to it; and it is equally bad as either.

Whether an indictment lies for a conspiracy to produce a mere private injury, not a crime *per se*, and which does not affect the public nor obstruct public justice? *Quere.*

There is a remaining question which I approach with great diffidence; it is, whether an indictment will lie for a conspiracy to produce a private injury which is not a crime in itself, and does not affect the public, or obstruct public justice? It cannot be denied that the courts have, in some instances, sustained such indictments. I have neither time nor ability to examine these cases, and the reasons upon which they are founded. I can only say that those reasons have failed to convince my mind. From the best reflection I have been able to give, I am inclined to think our statute and that of 33 Ed. 1, from which it was copied, are definitions of the offence of conspiracy. It does not say that such and such acts shall constitute conspiracy, which would be adding to the offences of that character already existing; but it says, "conspirators be they who confeder, &c.;" and it enumerates several instances of the offence, which were such at the common law; such as falsely to indict another, while it entirely omits others. But for the construction which the courts have given it, I should think that it was a declaration of the intention of the legislature, that certain things should be conspiracies, and all others which had been so considered, should no longer be punished as such, upon the great principle that the enumeration of several particulars is an exclusion of all others not specified. But it is involved in great difficulty, which probably can be removed only by legislative authority. If it were important to the decision of the cause, I would endeavour to make up an opinion satisfactory to myself; but as, in my opinion, the judgment should be reversed for other reasons, I abstain from a further consideration of this point. Mr. Chitty, in the preliminary note to his title conspiracy, after showing the contradictions between the cases says, "We can rest therefore

only on the *individual cases* decided, which depend in general on *particular circumstances*, and which are not to be extended. If this be true, and I believe it is, that no general rule defining the offence of conspiracy exists in the law, it presents a lamentable exception from the principles of our whole system. If the offence is to be declared after the fact, and cannot be ascertained before it, we may apply to ourselves the maxim, that miserable is the condition of a people where the law is so vague and uncertain as to rest only in the breast of the judge. I am unwilling to sanction any such principles. If it be consistent with the public feeling in England that judges should possess an indefinite power of extending a principle of criminal law to cases after the fact, so as to prevent what they may suppose a failure of justice, it is yet contrary to the first principles of our government, and subversive of the great object of our institutions—the security of personal liberty and property. It would be infinitely better that culprits should escape, than that any innocent man in community should be endangered. But ample provision has been made by the legislature for all cases of fraud and embezzlement; and little is hazarded by the assertion that no offence of that description can possibly be committed without violating some existing statute. There is no need, therefore, of stretching the powers, or enforcing the discretion of courts to prevent a failure of justice.

If, in addition to the uncertain and fluctuating condition of the criminal law in this respect, it should also be settled that the form of the accusation may be so general, vague and indefinite as not to apprise the accused of the specific offence he is charged with, then will be completed an instrument of tyranny and oppression worthy of a star chamber or an inquisition.

I am of opinion that the judgment of the supreme court should be reversed. ^

JONES, Chancellor, also delivered his opinion at large in favor of a reversal, on substantially the same grounds taken by SPENCER, Senator; and the chancellor was particular

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in urging the first ground taken by SPENCER, Senator, viz that the *means* agreed on by the alleged conspirators were not set forth, which he held was necessary, inasmuch as the fraud averred in the indictment to have been the object of the conspiracy did not appear by the indictment to be a legal crime.

STEBBINS, Senator. The defendant below has been convicted of a conspiracy, wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud the Sun Fire Insurance Company and divers other persons to the jurors unknown, of their goods, chattels and effects; and the indictment avers that the conspirators, by certain undue, indirect and unlawful means, did cheat and defraud the said company and other persons unknown, of divers promissory notes, bonds and mortgages.

The principal questions arising upon the record, appear to be, *first*, whether such a conspiracy is an indictable offence? *second*, whether the offence is sufficiently stated in the indictment; and *third*, whether the conspiracy is not merged or absorbed in the cheat which the indictment alleges was effected?

It has, however, been urged, that as choses in action were not the subject of larceny at common law, they cannot form the subject of an indictable conspiracy; but I apprehend, if it is not too *late* to say at this day that there is no property in choses in action, it is certainly too *much* to say that a person cannot be defrauded of his notes or bonds. He may be deeply injured in a variety of ways, by being deprived of that which possesses little or no intrinsic value. But there is substantial value in a bond or note. They form the subject of an action of detinue or trover; and a mere chose in action is frequently regarded as money for the purposes of tender or levy.

Many other formal objections have been taken to the record, of which it is sufficient to say, none appear to be well founded.

A conspiracy
to commit a
private fraud
is indictable.

First, then, is the conspiracy charged in this indictment an indictable offence? It is said not to be, for the reason

that its object was a mere private fraud; and the argument is, that the policy of the law is to prevent crime, and that either the object of the conspiracy must be the commission of an indictable offence, or the means by which it is to be effected must be of the same character, to render it indictable. The point submitted to the court, however, does not assume precisely that ground. It is, that a conspiracy to defraud an individual of his property is not indictable at common law, unless it is to be accomplished by criminal means; and indictable conspiracies are classed in four classes: 1. To commit crime; 2. To do an act prejudicial to the public, as a conspiracy among journeymen to raise their wages; 4. To prevent justice in a judicial tribunal; and 4. To charge one with crime.

It is obvious from this classification, that conspiracies may be indictable where neither the object, if effected, nor the means made use of to effect it, would be indictable without the conspiracy. Charging a person with a crime is not an indictable offence; but only subjects the wrong doer to an action of slander. Injuring his reputation by charges less than criminal, does not even subject him to an action of slander. Yet by the point it is admitted, and the cases are abundant to show, that a conspiracy to slander a man by charging him with a crime, or with being the father of a bastard child, is an indictable offence. (1 Sid. 68, *Child v. North*, 1 Keb. 203, id. 254. 1 Ventr. 304. *Rex v. Kinnersley & Moore*, 1 Str. 193. *Regina v. Best*, 2 Ld. Raym. 1168. *Rex v. Parsons*, 1 Wm. Bl. 392.) It is worthy of remark, that these are among the earliest cases of conspiracy to be found in the books; and it appears to me they furnish an unanswerable objection to the proposition, that a conspiracy, to be indictable, must have crime for its object, or must depend for its accomplishment upon criminal means.

In the case of conspiracies among journeymen to raise their wages, (*Rex v. Tailors of Cambridge*, 8 Mod. 11,) the object of the conspiracy is lawful, and the means by which the object is to be effected are no otherwise unlawful, than as the conspiracy makes them so. So .

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Early cases
that conspira-
cy is indictable
without criminal
means or
criminal ob-
ject.

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of Cambridge.*
8 Mod. 11.

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case of conspiracy among officers of the East India Company to *resign, (*Vertue v. Clive*, 4 Burr. 2472,) it is the conspiracy which constitutes the offence. The object to be effected, and the means by which it is to be effected, would be otherwise lawful.

Still, however, every conspiracy is not indictable; and Mr. Chitty very justly remarks, that it is impossible to conceive a combination, as such to be illegal. It is the object intended to be effected, or the means by which the object is to be executed, that renders it an offence; and the difficulty lies in defining with precision what objects, or what means of effecting the object, give a criminal character to the combination. An unlawful assembling of persons to do an unlawful act is an indictable offence, notwithstanding the act be not done, or be not indictable if done. It is an offence strongly analogous to that of conspiracy. The policy of the law, in both cases is, to prevent mischief by punishing as a crime the attempt to commit a wrongful act; and I can see no reason why an attempt by a number to do a wrongful act, may not be punished as a higher offence than the mere doing of the act by a single individual. The object is to prevent the mischief. To do so, it is necessary to guard against the combined skill and power of a dangerous confederacy, and the remedy ought to be proportioned to the occasion.

Combinations against individuals are dangerous in themselves, and prejudicial to the public interest; and it is upon this principle that the doctrine of maintenance is founded. It is no wrong for an individual to prosecute his rights against another in a court of justice; but it is, notwithstanding, criminal for others to maintain him in his suit; and for the reason that such maintenance tends to oppression; that the weak would be endangered by combinations of the powerful and wealthy. Chief Justice Parsons illustrates the doctrine of conspiracy with much point in one of his opinions. He says a solitary offender may be easily detected and punished; but combinations against law are always dangerous to the public peace, and to private security. To guard against the union of numbers

to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished, to prevent the doing of any act in execution of it.

"If, then, crime does not necessarily form the object or means of executing a conspiracy, to render it indictable, it becomes necessary to inquire more minutely, whether such a conspiracy as that charged in this indictment is a public offence. It is said by Hawkins, (B. 1, ch. 72,) that all confederacies wrongfully to prejudice another, are highly criminal in common law; and the same doctrine is laid down in 3 Chitty's C. L. 1139, 2 Russell, 1800, Archbold's Cr. Pl. 380, and Christian's note to 4 Bl. Com. 136; all elementary writers of approved authority. The definition of the offence given by these authors, is a confederacy to do an unlawful act, or a lawful act for unlawful purposes, or by unlawful means; and this is said to be the true one by Ch. J. Parsons, in *Com. v. Judd*. (2 Mass. R. 329.) All these authors admit that a combination, wrongfully to injure individuals, may be indictable; but Mr. Chitty remarks, that the point at which such a conspiracy becomes criminal does not seem to be precisely defined. It is, in its nature, difficult to define. The offence itself is one which, with some propriety, may be said to consist in an artful contrivance and combination to produce the injuries consequent upon other crimes, in a manner calculated to elude the provisions and restraints of criminal law. The forms in which it appears are as various as the ingenuity of man is unbounded.

But it is contended, upon the authority of the adjudged cases, either that these writers are mistaken in saying that conspiracies to defraud individuals are indictable; or that, when they speak of an unlawful or wrongful act as the object of the conspiracy, they mean an act of itself indictable. The distinction between an unlawful and a criminal act, however, must be very obvious to any person of much less discrimination than either of those writers; and I should not readily suspect them of losing sight of the distinction. But the distinction is an important one in its bearing upon this case; and an examination of the cases becomes neces-

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sary to determine whether the definition of the elementary writers is correct in this respect. It is contended for the defendant that all the cases may be properly classed among the four classes before mentioned; and, as a consequence, that a conspiracy to defraud "an individual is not an offence unless it is to be accomplished by criminal means. As I read the cases, they are not susceptible of such a classification; and many of them are mere private frauds, effected in pursuance of a conspiracy, and for that reason held to be indictable as conspiracies. East, in his "Pleas of the Crown," (ch. 18, sec. 5,) remarks, that there are instances to be found in the books of cheats, in their nature private, which have yet been adjudged to be indictable at common law; but, upon examination, they will either appear to be founded in conspiracy or forgery. Thus (he proceeds) "it is said by Hawkins, that the suppression of a will is indictable as a cheat; for which he cites Noy, 103. What the form of the count was in that case, does not appear by the report; but as there were several persons convicted, it is probable they were charged with a conspiracy or combination." Here is certainly the opinion of East, that a private fraud, coupled with a conspiracy, constitutes an indictable offence, and his comments upon the case in Noy, appears to me to be the only one of which the case is susceptible. The suppression of the will was a mere private fraud.

Child v. North,
1 Keb. 254.

In the case of Child v. North, (1 Keble, 254,) the indictment being for a conspiracy to charge H. with fornication, a motion was made in arrest of judgment; but the court denied the motion, on the ground that it was likely to be a charge and loss to H.; and Foster, Justice, said, if the conspiracy be to do an *unlawful* act, the very conspiracy is a crime, and so the court agreed.

Rex v. Cope,
Str. 144.

The King v. Cope, (1 Str. 144,) was a conspiracy to injure the trade of a card maker, by bribing his servants to mix grease with the paste used in the manufacture of the article; and held to be indictable. The case mentions that it was the king's card maker; and this circumstance, it is contended, renders the offence a public one. The case

does not define the distinction between the king's card-maker, and the king's subjects generally. If there is any distinction, I should apprehend it does not arise from any interest which the crown had in the manufacture of cards, more than in any other branch of industry. The article itself would not seem *to be one which would be under the special care of the government, or which should need any peculiar guarantee of good quality. By the title given, I understand nothing more than a mechanic who occasionally, or perhaps usually, supplied his majesty with articles of this manufacture ; and the good sense of the case appears to me to be, that a conspiracy to injure the trade of a mechanic by fraudulent means is an indictable offence.

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The King v. Eccles (1 Leach, 274,) was a case of conspiracy to prevent an individual from exercising the trade of a tailor in a particular place, which was held indictable. It is said to have been a crime for the reason, that the conspiracy was to restrain trade, and therefore an offence against the public ; and such is the comment of Lord Ellenborough, in 13 East, 228 ; but with great deference, I should doubt whether it was not the private injury to the individual, which operated upon the mind of the court. The interest of the public was, such as they have in the prosperity of every individual occupation, remote and trifling.

Rex v. Eccles,
1 Leach, 274.

The King v. Robinson, (1 Leach, 47,) was a conspiracy to marry a person who personated a Mr. Holland. The female was Mr. Holland's housekeeper, who procured the other defendant to marry her, calling himself Mr. Holland, and being clothed from his wardrobe. The object of the conspiracy was to set up a fictitious claim to the estate of Mr. Holland. It appears to me to be a strong case of conspiracy to defraud an individual ; and to have been decided as such. A different reason is however assigned ; that the conspiracy tended to the perversion of justice, and contemplated an abuse of the courts of justice, in attempting to establish the claim. Surely it does not necessarily follow, that the claim would be litigated ; and I can conceive of no conspiracy, which may not, under some circumstances,

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Rex v. Dela-
val, 3 Barr,
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give rise to a litigation. Might not the bonds and notes of the Sun Fire Insurance Company?

The King v. Delaval, (3 Barr. 1434,) was a conspiracy to procure a female to be bound to one of the defendants, for the purpose of facilitating her prostitution. Although grossly *immoral, it was, nevertheless, not a criminal act, if done by an individual, or one by which the public can be said to be chiefly injured. It is not an offence punishable by the common law; and Mr. Christian remarks, in his note to 3 Bl. Com. 142, "it appears to be a remarkable omission in the law of England."

Queen v. Or-
bell, 6 Mod.
42.

The Queen v. Orbell, (6 Mod. 42,) was a conspiracy fraudulently to cheat I. S. of his money, by getting him to lay money on a foot race, and prevailing on the party to run booty. The court said, being a cheat, though it was private in the particular, it was public in its consequences.

Rex v. Gill, 2
B & A. 204.

In The King v. Gill & Henry, (2 Barn. & Ald. 204,) the indictment charged that the defendants conspired, by divers false pretences and subtle means, to obtain the monies of two individuals. It was objected, as in this case, that the means by which the object of the conspiracy was to be executed, were not spread upon the record. The objection, however, was overruled by the court, who say, "It is not necessary to state the means at all in the indictment, it being quite sufficient to charge the illegal conspiracy, which is of itself an indictable offence."

This case is attempted to be classed among conspiracies to commit crime; but it will be remarked, that the indictment is almost precisely similar to that now before the court. One does not set out the false pretences, which would be necessary in an indictment for obtaining money by false pretences, and the other does not set out the deceptions necessary in an indictment for a cheat. Each states the object of the conspiracy; but neither the means of its accomplishment. I regard it as a parallel case upon both points.

Rex v. Roberts,
1 Camp. 399.

The case of The King v. Roberts, (1 Campbell, 399,) was a conspiracy by persons to pass themselves off as men

of fortune, and thereby to defraud certain tradesmen; and it was held to be an indictable offence.

The *Com. v. Judd*, (2 Mass. Rep. 329,) was a case of conspiracy to manufacture a base article resembling indigo, for the purpose of sale at auction as indigo. The defendants were found guilty of the manufacture, but not of the sale, and were convicted of the conspiracy. Chief Justice Parsona, "in giving the opinion of the court, remarks, "It is sufficient that the conspiracy was made with the intent of acquiring the monies, goods and chattels of the citizens of this commonwealth, by fraudulent and dishonest means." The object was to defraud whoever might become purchasers at the auction; and it is contended that, therefore, it was a fraud upon the public. It was undoubtedly a fraud, which, if executed, would have defrauded that part of the public who should become purchasers; and in that respect bears a strong analogy to a fraud upon a public institution, which affects not only those who may be owners or purchasers of its stock; but also others whose contracts of indemnity depend upon its solvency. Such a case, I think, does not suffer by a comparison in this respect with the case in Massachusetts.

A very similar case is found in 3 Serg. & Rawle's Pennsylvania Reports, 220, (*Com. v. Colins*.) It was a conspiracy to circulate spurious notes of the similitude of bank notes, and held indictable.

But the strongest case, and the one most analogous to the present upon this point, is *The State of Maryland v. Buchanan* and others. The indictment charged that the defendants, being officers of the U. S. Branch Bank, conspired to use, and did use a large amount of the funds of that bank, for the space of two months, without paying interest for them. The case came up on demurrer to the indictment; was most ably and elaborately discussed by the court; all the authorities on both sides were minutely examined every question which had been raised in this case was agitated in that; and two of the judges were in favor of the demurrer, and one against it. In the court of appeals the cause underwent a second discussion; and the judg-

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ment was reversed by the unanimous opinion of that court. and the defendants ordered to plead over to the indictment. (5 Harris & Johnson's Rep. 317 to 368.) If the decision of a superior court of a sister state, is in any case entitled to consideration here, this case, from its importance, from the depth of research which it produced, and from the very great ability with which it is decided, is in my judgment, entitled to the highest consideration. *The more so for the reason that the court no where, in their opinion, refer to any interest which the public, in their aggregate capacity, have in the United States Bank ; but place their decision upon the same grounds as if the bank had been wholly owned by individuals.

Upon this point, then, we have the opinion of the courts of Maryland, Pennsylvania and Massachusetts, the opinion of the elementary writers, Hawkins, Chitty, Russell, Archbold, East and Christian, and a current of decisions of the English courts, all going to show, in my estimation, that such a conspiracy as that charged in the indictment before us, is an indictable offence. The whole furnishes a mass of authority altogether irresistible. But to this I think we may add the whole class of cases of conspiracy to defame the character of an individual. It is the individual in those cases who is defrauded of his reputation ; and I perceive no difference, so far as the public is concerned, between depriving an individual of his property and of his reputation, by means of a conspiracy : and to say that those conspiracies are public offences, because such defamation may give rise to judicial investigation, is to my mind too great a refinement. If this class of cases was limited to conspiracies falsely to indict an individual, there would be some reason in it ; but it is not so. A conspiracy to slander constitutes the offence. And in the *King v. Rispal*, (3 Burr. 1320,) it was objected that the charge of taking hair out of a bag was not criminal ; but the court say the gist of the offence is the unlawful conspiracy to injure the man by this false charge ; not that it has a tendency to pervert the administration of justice.

Rex v. Rispal,
3 Burr. 1320.

An examination of the cases cited, convinces me that a

conspiracy may be defined (so far as it is capable of a precise definition) as a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public; and that it is not necessary, to render the conspiracy indictable, that its object should be the commission of a crime.

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This doctrine is impliedly admitted by the case of *The People v. Olcott*, (2 John. Cas. 311.) It was a conspiracy to defraud a bank of its money. The jury found the agreement "to obtain the money from the bank, but with an intent to return it. Kent, J., who gave the opinion of the court, does not intimate that a conspiracy to defraud a bank of its money, is not an indictable offence; but very properly puts the decision of the court on the ground that the jury did not find an agreement to procure the money with a *fraudulent intent*. This, he says, is no answer to the substance of the charge, which was the unlawful and fraudulent intent to procure money from the bank.

People v. Olcott, 2 John. Cas. 311.

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Still, however, as before remarked, it would probably be too much to say that every conspiracy to defraud an individual, or to do so by an unlawful act, is indictable. The *King v. Turner*, (13 East, 228,) was a conspiracy to commit a trespass by going armed in the night into the premises of an individual for the purpose of snaring hares. It was held not indictable; and Lord Ellenborough remarked that all the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity; and he refers to a case of conspiracy to indict falsely. If he had said *fraud* or falsity, I apprehend it would have been more conformable to the cases referred to. There was in this case neither fraud, falsity nor deceit; and perhaps one of these may be essential when the object of the conspiracy is not criminal in itself.

Rex v. Turner,
(13 East,
228.)

The *King v. Pywell* (1 Starkie's Rep. 402,) is another case relied upon to show that a conspiracy to commit a private fraud is not an indictable offence. Pywell advertised a horse for sale, and undertook to warrant it. McLean, the purchaser, applied at the stable, and was told by the other defendant, (Pywell not being there) that he knew the horse

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to be sound; and had known him a long time, and would warrant him in behalf of Pywell; upon which McLean purchased. Lord Ellenborough intimated that the case did not assume the shape of a conspiracy; and that the evidence would not warrant any proceeding beyond a civil action for the damages. This is the whole case as it appeared at *nisi prius*. There was no conspiracy proved, nor any facts from which it could be inferred. There is not even such a deceit shown as would have sustained a claim for damages on that ground. The case is put by the court on the ground of want of proof, and not on the ground that a conspiracy to commit a private fraud is not an offence; and it appears to me to have no bearing on the question. If the law is that such a conspiracy is not indictable, it seems a little remarkable, that among the multitude of cases upon the subject, there should be found none more applicable to the point than the two above mentioned; for certainly the last proves nothing on the subject; and the most which the first case establishes is that there may be exceptions to the general rule.

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A conspiracy to defraud a corporation for the purpose of fire insurance, is indictable, if it be conceded that this would not be so of a private individual. •

But it is not necessary to the decision of this cause to go so far as to say that every combination to defraud an individual is indictable. The victim of the fraud, in this case, is an incorporated public institution, chartered for the purpose of affording indemnity to the public against the hazards of fire; located in the commercial metropolis of the continent; its stock probably in the hands of a large number of individuals; and a still larger number, probably, depending upon it for indemnity against losses. Although, for most purposes, such an institution is to be regarded as an individual, yet cannot the court judicially perceive and recognize an interest which the public in fact have in such an institution, certainly as important as any they have had in any of the cases cited?

∨
We may indeed judicially determine that the public have no interest in such conspiracies; but I apprehend it will be difficult for us to convince the public that they have not felt their consequences. It is a crime to conspire to give a false value to public stocks. (3 Maule & Selw, 68.) It

is not equally so to combine to destroy the value of a stock which is a subject of daily sale in the stock market? And are not the interests of trade as seriously affected as they possibly could have been by the sale of a spurious article of merchandise at auction? The purchaser in either case is unknown, and is without the means of guarding against the deception.

The effect of this doctrine of punishing conspiracies to commit private frauds, as offences against the public, has been strenuously urged in the argument as almost entirely prostrating the jurisdiction of the court of chancery in cases of fraud. It would become us to pause before we should *adopt any principles that might either destroy or cripple a jurisdiction so infinitely important and essentially necessary as is that of our courts of equity in cases of fraud. But however sincere may be the apprehensions entertained upon this subject, I can perceive no grounds for extraordinary alarm; and cannot persuade myself but that those courts will continue to exercise their accustomed jurisdiction in relieving against frauds, unshorn of any of their legitimate powers; notwithstanding the recognition of the doctrine of conspiracy.

The rule of that court, it is true, is, that a defendant is not bound to answer to facts which may criminate or subject him to a penalty. (4 John. Ch. Rep. 439.) It is the same protection which the law affords to witnesses in other courts. But the court is not thereby ousted of its jurisdiction. Because a defendant is not bound to answer as to certain facts, the plaintiff is not precluded from proving those facts by witnesses, nor is the court precluded from administering the proper relief when the facts are shown. The settled law of that court has always been, that a demurrer to the *discovery* sought is no answer to that part of the bill which prays relief. (3 John. Ch. Rep. 471. 5 id. 186.) The amount of the objection, then, is this: if conspiracies to commit private frauds are criminal, a defendant in equity is not bound to confess such crime. The plaintiff must prove his case by other means than the defendant's confession; and then the court stands ready to relieve him. Surely

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there is no great cause of alarm in this doctrine. It is simply putting the plaintiff upon proof of his cause in that court, in the same manner as he is bound to prove it in every other court.

The next question is, whether the offence is sufficiently set out in the indictment.

An indictment is said to be a narrative of an offence. (2 Hale's P. C. 169.) And the general rule of pleading in criminal cases is, that such facts must be stated upon the record as, in judgment of law, are sufficient to constitute the offence.

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If, then, this offence consists in combining to do an unlawful act, or a lawful act by unlawful means, it will clearly only be necessary in the first case to charge the combination *and the object of it, that the court may see it was a conspiracy to do an unlawful act; but where the combination is not rendered criminal by the unlawfulness of its object, it will be necessary to go farther until the point of criminality is reached, and set out such unlawful means as rendered it so.

The combination and the object of it must always be set out, because a mere combination is no crime; but coupled with an illegal object it becomes so. When neither the conspiracy nor the object intended to be affected by it are unlawful, but the means intended to be used in executing that object are illegal, then it becomes necessary to set out those means as a constituent part of the offence.

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Berenger, 3 M.
& S. 67.

Take for instance, the case of *The King v. De Berenger*. The object of the conspiracy was to raise the price of the stocks, which the court say is not in itself unlawful; but the means by which that object was to be executed were so. The means were circulating false and deceptive reports. The circulation of these false reports formed part of the agreement or combination, and rendered it criminal. Lord Ellenborough, in that case, says, "the crime lies in the act of conspiracy, and would have been complete although it had not been pursued to its consequences." Le Blanc, Justice, remarks, that "the offence is not in raising the funds simply; but in conspiring by false rumours to raise

them." In *The Queen v. Best*, it was objected that nothing came of the conspiracy, and that the bare conspiracy is not indictable unless something be done. The court overrule the objection, and say the conspiracy is the gist of the offence. So in *The King v. Rispal*, the court say the conspiracy is the gist of the offence. In *The King v. Eccles*, Buller, J. said the means were matter of evidence to prove the charge, and not the crime itself. It is therefore not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence. Lord Mansfield remarked, "The conspiracy is stated, and its object. It is not necessary that the means should be stated." In *The King v. Gill and Henry*, all the judges agree that the conspiracy is the gist of the offence; and that the offence is complete although no means may be agreed upon or made use of. *The King v. Kinnersley & Moore* is also an authority to show that the offence is complete though no act be done in pursuance of the conspiracy. So also in *The Brewer's case*, (1 Levinz, 125.) Ch. J. Parsons takes the same ground in *The Com. v. Judd*. He says the gist of the offence is the unlawful confederacy. The offence is complete when the confederacy is made; and any act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it.

These references, added to the authority of the elementary writers, Chitty, Russell, &c. are quite sufficient, in my judgment, to establish the proposition, that the offence consists in the act of combining unlawfully; that where the object is unlawful, the offence is complete, whether the means of execution be agreed upon or not; that it is not requisite that those means should form any part of the agreement, unless the agreement is thereby rendered unlawful; and in either case, that the offence is complete, whether any act be done in pursuance of the confederacy or not.

If, then, a confederacy to do an unlawful act is criminal, although no means of execution be agreed upon, it follows that, in an indictment for such an offence, where the means

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1 Sid. 174.
Rex v. Rispal,
3 Burr. 1320
Rex v. Eccles,
1 Leach, 274.

Rex v. Gill, 2
B. & A. 204.

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Rex v. Sterling, and 17
others, 1 Lev
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were agreed upon, it would be unnecessary to state them, because they form no part of the offence. It is complete without them. In the one case the means could not be set out; in the other it would as certainly be unnecessary.

Again, if the offence be complete, though no act is done in pursuance of the conspiracy, where can be the necessity of stating the means intended to be made use of, provided the conspiracy otherwise appears to be unlawful?

Starkie's Treat. on Cr. L. 170, is, however, relied upon, to show that unless the object of the combination is criminal, the means must be set out. He says, in the beginning of his chapter on conspiracies, that the general averment that the defendants did conspire, &c., to accomplish an object apparently criminal, is sufficient without showing in what manner or by what means, &c.; and on the next page he remarks, "But unless the object be criminal, it seems to be necessary to show an intention to accomplish it by some improper means." Now by the terms *apparently criminal*, I should understand something not necessarily criminal; and in the subsequent sentence, he evidently refers to the apparently criminal object before spoken of. Standing by itself however, the last proposition is evidently a loose one; for it admits that where the object is not criminal, the use of means which he characterises as *improper* simply may render the conspiracy an offence. On the whole, I do not see that he differs essentially from the other writers.

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My view of the case, if correct, results in this: The object of the conspiracy charged being to defraud the Sun Fire Ins. Co. and other persons, of certain notes, bonds, &c., is apparently upon the record an illegal object; and whether the nature of the fraud contemplated, or its effect upon the public be considered, presents at least as strong a case as most of those which have been held to be indictable both in England and in this country; and therefore renders the conspiracy criminal.

The conspiracy itself being criminal by reason of the illegality of its object, the means by which it was to be put in execution become immaterial, and are not necessary to be set out in the indictment.

The case, however, has been presented in another point of view, in which I shall proceed to examine it as briefly as possible. This view of it proceeds upon the assumption that either the object of a combination, or the means by which it is to be accomplished, must be criminal, or such as, if executed by an individual, would be indictable, to render such a combination an indictable offence. Without attempting to combat this proposition further than has already been done, but assuming it to be true, the question then is, whether the indictment in this case sets out the object of this conspiracy sufficiently to show to the court that it was criminal. It charges that the defendants conspired; by wrongful and indirect means, to *cheat* and defraud the insurance company and others. To *cheat*, in the legal acceptance of the term, certainly means the commission of an indictable offence; but it is contended that the term, in ordinary acceptance, includes as well those frauds which are not criminal as those which are; and therefore that the particular means by which the cheat was to be effected should have been set out, to enable the court to judge whether the means of fraud were such as rendered it a technical cheat. In an indictment for the cheat, it certainly would be necessary to set forth the means by which it was effected; but it appears to me that when it becomes necessary, in an indictment for one offence, to name another, and it is done by its technical name, the term must be taken according to its legal import. The term is here used collaterally, and as descriptive of an offence which the pleader is not undertaking to set out; but which it becomes necessary to name, and which is well known in law by that name. The term so used, must necessarily import the offence, without setting forth the particulars which in judgment of law constitute it.

This indictment, then, charges a conspiracy to defraud and cheat; or in other words, a conspiracy to defraud by such means as amount in law to a cheat.

But it would seem that it is not always necessary to specify all the means by which a crime is to be perpetrated, even in an indictment for the offence itself. In treason,

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The object here is so far set out as to show it to be a crime.

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Chitty says, (2 Chitty's Cr. Law, 65,) "the laying that A. and B. met and proposed the means how to effect the king's death is sufficient, without alleging the particular means upon which they agreed, which is matter of evidence. So of subornation of perjury, he remarks, (id. 318,) "It is not necessary to set forth the means used by the defendant to effect his design; but it is sufficient to state that he, by sinister and unlawful labors and means, procured the commission of the perjury." And such is the form of the indictment for endeavoring to suborn. (id. 482.)

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There is a little different view of this point, which may tend, at least to strengthen the view just taken. East, in his Pleas of the Crown, (ch. 18, sec. 1,) gives what I esteem one of the best definitions of a cheat to be found in any of the works upon criminal law. He says, it is not every species of fraud which is the subject matter of a criminal charge at common law. It must be *such as affects the public*, such *as* is public in its nature, calculated to defraud *numbers*, to deceive the people in general. In 2 Russell, 1380, we have a similar definition. The King v. Wheatly was an indictment for a cheat in selling 16 for 18 gallons of liquor. Lord Mansfield, in his opinion, says the offence that is indictable must be such an one as affects the public; as if a man uses false weights and measures, and sells by them to all or many of his customers. So if a man defrauds another under false tokens; for these are deceptions that common prudence cannot guard against. So if there be a conspiracy to cheat; for ordinary care is no guard against this. Those cases are much more than mere private injuries. But here are no false weights; no false tokens; no conspiracy. Denison, J., also says, here are no false weights nor measures, nor any false token at all, nor any conspiracy. If there be false tokens, or a conspiracy, it is another thing. Wilmot, J., remarks with great point, that the true distinction in all cases of this kind, and which will solve them all, is this: that in such impositions or deceits which common prudence may guard persons against the offence is not indictable; but where false weights and measures are used, or false tokens pro-

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ly, 2 Burr.
1125.

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deceit, or such methods taken to cheat and deceive as people cannot, by any ordinary care or prudence, be guarded against, then it is an offence indictable. Now the bearing which these authorities have upon the point is twofold; *first*, it is not necessary that a fraud should affect the public in its aggregate capacity to render it indictable as a cheat; but if it affect a *number* of individuals, or a particular class of individuals, as was said by the court in *The King v. De Berenger*, or even *one*, by means calculated to deceive many, it is an indictable offence. What number of persons to be defrauded, then, renders the fraud indictable? Are there a sufficient number named in the indictment in this cause? Is there not a particular class of individuals (to wit, the stockholders, &c.) injured by defrauding this insurance company?

But again: the doctrine of *Wheatly's case* seems to be, that a cheat effected by means of a conspiracy, is equivalent to one effected by means of false tokens; that the combination takes the place of the false tokens, and is of itself to be regarded as a false token, or one of the methods taken to cheat, against which ordinary care is no guard. If the combination alleged is to be regarded in this point of view, then we have a technical cheat set out upon the record, with all its attributes.

This view of the question, however, though submitted with some confidence, is not assumed as conclusive; but as suggested by *Wheatly's case*, and bearing upon the point which to me appears to be otherwise fully established. That case, at all events, is properly introduced, as illustrative of the nature of conspiracies.

Aside, however, from any reasoning upon this subject, the authorities to my mind appear to be controlling.

In the *King v. Eccles*, it was objected that the means by which the conspiracy was to be executed, were not disclosed in the indictment; but the court held the indictment good notwithstanding. The indictment in *The King v. Gill & Henry*, was almost a literal copy of the one now before the court. It charged that the defendants conspired, by divers false pretences and subtle means, to obtain

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monies from two individuals. This charge, although clearly insufficient to sustain an indictment for obtaining money by false pretences, was held sufficiently particular in an indictment for the conspiracy. This case, therefore, is a direct authority to the point.

"land v. 5
" John. 817.) The case of *Maryland v. Buchanan*, (5 Har. & John. 817,) has been relied upon to show that the means ought to be set out in the indictment. They were so set out in that indictment; but the case is far from being authority for saying that when the object of the conspiracy is to commit an indictable offence, the means must necessarily be stated in the indictment. The use intended to be made of the case, in this respect, is, I presume, to show that where the object of the conspiracy is unlawful, though not criminal, the means must be stated, that they may appear to have been criminal.

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In my view of that case, it differs essentially from the one now before the court in this particular. The indictment there is, that certain officers of the bank conspired to use, *and did use a large sum of money, belonging to the bank, for the space of two months, without paying any interest for the same, and without securing the repayment thereof. There is certainly nothing criminal in obtaining the use of money without interest, and I can discover nothing illegal in it. The law does not give interest for the use of money; but refuses to give it in all cases where there is no contract to pay it existing between the parties. It will, it is true, as in other cases, raise an implied promise to pay it under certain circumstances; but the claim always rests upon the ground of contract. The *gravamen*, then, is in not contracting to pay interest. The means by which the use of this money was to be obtained, were the making of false and fraudulent entries and statements in the books of the bank, calculated to show that the money was loaned on sufficient security in stock.

The means were therefore fraudulent and unlawful; and it became necessary to set them out in the indictment, to give a character to the conspiracy, otherwise not unlawful. Here, too, I discover nothing criminal or indictable in the

means made use of, except as connected with the conspiracy. The defendants were officers of the bank, intrusted with its funds and books, and were guilty of a gross and fraudulent breach of that trust; but were not indictable, unless on the ground that the fraud was such as to affect the public. (East's P. C. title Cheats, chap. 18, s. 1.) And if the fraud was indictable, as affecting the public, most certainly a conspiracy to defraud such an institution, is indictable on the same ground.

This case, therefore, appears to me to be one of the strongest authorities to show that a conspiracy to do an act neither criminal nor unlawful, but to be executed by unlawful and fraudulent means, (though not criminal,) and prejudicial to an incorporated public institution, is an indictable offence; such unlawful means being set out in the indictment; but by no means an authority to prove that in charging a conspiracy to commit an offence of itself indictable, it is necessary to aver the means of execution. That it is an authority directly the reverse, I quote the language of the two judges of the inferior court, who were the only judges in either court against the prosecution. (3) They say, "If two men should agree, in so many words, to cheat another of his money, they conspire to do a criminal act; because the law would presume that they did not mean to stop short of the means necessary to effect a cheat; and the particular false tokens need not be set out; because the conspiracy is the gist, and nothing need be done in execution of it. But if A. & B. agree to get the money of C., the law would not *instantly* infer that they intended a cheat, because it might be their object to obtain it on loan; and although they might know themselves to be insolvent, yet the law, for the purpose of converting the private fraud into an indictable cheat, would not suffer the conspiracy to be substituted for a privy false token. So if two conspire to commit a burglary, the offence is complete, and the particular means need not be set out, although it might depend upon them whether it was a bur-

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(3) These opinions are not given in the final report. (Vid. 5 Har. & John. 324, note (e).)

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glary or a larceny." And that, they say, was all the court decided in *The King v. Gill & Henry*, which was a conspiracy to commit an offence which, if individually committed, would be indictable.

. Here, then, is the opinion of the court in Maryland adopting the case of *Gill & Henry*, and sanctioning an indictment in the very words of the one now before the court. The very argument made in this cause, is here met distinctly. It is that the indictment does not charge a conspiracy to *cheat*, because the means necessary to constitute a cheat are not set out. The court say, as was said in the case of *Gill v. Henry*, where there is a conspiracy to commit a *cheat*, a *burglary*, or a *larceny*, the means need not be set out, although it depends upon them whether the act be a cheat, a burglary, or a larceny. The terms themselves are descriptive of the offence, and necessarily include the requisite means to constitute it.

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1 John. 66.

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The case of the *People v. Barret & Ward*, (1 John. 66,) is the last one I shall notice on this branch of the case. It has been relied upon with great confidence, as establishing a doctrine different from that which the other cases appear to me to warrant. The defendants were indicted for a conspiracy to cheat O. D. of his money, goods and chattels, under certain false and deceitful pretences, particularly setting them out, and among the rest, a false representation that the maker of a note passed by the defendants to O. D. was solvent and able to pay the note. This false representation was set out without a venue. The defendants were convicted, and the judgment having been arrested, they were again indicted for the same offence, and pleaded the former acquittal in bar. It was contended, among other things, that the first indictment was defective in substance, so that the defendants never were in jeopardy on account of it. Kent, Ch. J. and Spencer and Thompson, Js., were of the opinion that the first indictment was defective, in not showing a venue to the false representation; and therefore, that the defendants were entitled to an acquittal on the second indictment. Tompkins and Livingston, Justices, were against the acquittal. The

strength of this authority consists in this, that unless it was material and necessary to have set out the false pretences and representations in the indictment, the want of a venue to such representation could not have vitiated it. That the case is on authority of some weight upon this point must be admitted; and if I do not sufficiently appreciate its weight, it certainly cannot be owing to any want of respect for the judgment of the distinguished gentlemen who constituted the majority of the court.

The indictment which is adjudged to be defective, it will be seen by the report of the case in 2 Caines, 304, had previously been before the court; and no objection taken to it in this particular, although the judgment was arrested for another reason; the improper withdrawal of a juror. The great and leading question before the court, on the second indictment, was not as to the sufficiency of the first indictment, but whether a party who had been once tried for an offence, could be again put upon his trial for the same matter. Throughout the whole case, not a single authority is cited upon the law of conspiracy, or the form of an indictment for that offence. The attention of the court was not drawn to that subject, and in all their remarks upon the sufficiency of the indictment, they evidently treat it as an indictment for obtaining money by false pretences, and test its sufficiency by the rule applicable to such a case. Being a minor point in the cause, their attention does not seem to have been called to the distinction between an indictment for a conspiracy as a substantive offence, and an indictment for a cheat effected in pursuance of a conspiracy.

But a closer examination, I apprehend, will detect a material distinction between that indictment and the one now before the court.

In the case before us, the indictment charges a conspiracy by wrongful and indirect means to cheat and defraud the insurance company, &c.

I have already considered the term *cheat* here used, as descriptive of the offence known in law by that name, and endeavored to show that such must be taken to be its

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import; that being used collaterally in an indictment for another offence, it can import nothing short, because no means being set out, the term itself necessarily includes the means requisite to constitute a cheat in law; that therefore the indictment charges an indictable offence; a cheat being such.

Now in Barret & Ward's case, the indictment charges a conspiracy to cheat under a false pretence of Barret's securing to be paid to O. D. a certain sum by the transfer of a certain note which he represented to be good, &c.; in other words, a conspiracy to cheat in a particular manner. If it had only charged a conspiracy to cheat without saying more, the indictment would have been a cheat in law; but there is no room here for such indictment, because it goes on to state in what manner, and sets out facts, where the law would otherwise have supplied them by indictment. Hence, it becomes necessary to look at the facts set out, in order to determine whether they amount to a cheat or not. They therefore become material, although unnecessarily set out.

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The statement of these pretences cannot be rejected as surplusage, because it is introduced as part of the description of the offence, and as a qualification of it. Had the indictment charged the offence of conspiracy, and then introduced the statement of these facts to show its execution, such statement would not have been material; but, upon the principles of the law of conspiracy before stated, might have been rejected as surplusage, the offence being complete, whether the conspiracy was executed or not. If, therefore, this part of the indictment become material, for the reasons stated, the decision of the court does not affect the question in this cause. It is not a decision that the means *must* be set out in the indictment; but a decision that where they *are* set out as part of the description of the conspiracy itself, and as qualifying the offence, they become material, and must be correctly set out.

These considerations induce me to regard this case as much less important in its bearing upon the cause before

us, than it seems to have been regarded by others; and as by no means conclusive to show against the current of authorities before noticed; that the means of execution must necessarily be set out in an indictment for conspiracy, or that they ought to have been spread upon the record before us.

The indictment in this case alleges that the insurance company and other persons were cheated and defrauded by means of the conspiracy charged, of divers bonds, mortgages, notes, &c. And the question here arises, whether an executed conspiracy is not merged or lost in the felony or misdemeanor which may have been committed in pursuance of it. If a conspiracy to commit a felony is executed, there can be no doubt, but the conspiracy, being a misdemeanor, is merged in the felony, upon the familiar principle that a lesser offence is merged in the greater; and I understand the doctrine of merger to be applicable only to cases of that description. The case before us is a conspiracy, which is a misdemeanor, to commit a cheat, which is also a misdemeanor.

The argument is not exactly that one misdemeanor is merged in another; but that where the conspiracy to commit a misdemeanor is executed, the conspiracy becomes a part of the misdemeanor which was its object; and that in such case, an indictment does not lie for the conspiracy alone. This argument appears to proceed upon the supposition which has before been noticed that every conspiracy must be to perpetrate an indictable offence, or an act by means which would be indictable; for otherwise, if it be true, as I have endeavored to show, and as I think was the case in the cause in Maryland, that a conspiracy may be indictable, although the act to be done, if executed by an individual, or the means made use of, would not be indictable, it follows that the conspiracy, which is a misdemeanor, may be merged in acts which do not of themselves amount to a misdemeanor. The consequence would be that a conspiracy might be indictable, if not executed, which if executed would not be. A further consequence seems also to be involved; that the commission of one

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misdemeanor would be a defence to another. As in case of an indictment for an assault, proof that it was accompanied by battery would be a defence. So proof of an intent to murder, to an indictment for an assault and battery. There are, in this case, different grades of the same misdemeanor; and although it is true, that, on an indictment for an assault, the defendant cannot be convicted of a battery, yet the converse is not true; and it cannot be doubted that proof of a battery would be no defence to a charge of assault, or that a conviction for an assault would not be a bar to an indictment for an assault and battery arising out of the same transaction. The higher grade of the same misdemeanor includes the lesser; but a conviction for either grade bars any other prosecution for the same misdemeanor. So, I apprehend, in the case of a conspiracy. It may perhaps be admitted that an executed conspiracy to commit a misdemeanor, is a higher grade of the same offence than a bare unexecuted combination. Yet it by no means follows that a conviction for the latter would not be a bar to an indictment for the former. I cannot entertain a doubt that it would.

Com. v. Kings-
bury, 5 Mass.
Rep. 106.

The case of the Com. v. Kingsbury, (5 Mass. Rep. 106) is relied upon to sustain this objection; but, on examination, it will be found that the object of the conspiracy in that case was, the procurement of goods in a manner amounting to larceny; and the court very properly held that the conspiracy being a misdemeanor, was merged in the felony. They, "however, go on to say that the same rule would apply in cases of misdemeanor; that "an intent to commit a misdemeanor manifested by some overt act is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offence." I do not perceive how the general remark is strengthened by this illustration. Granting that the offender can be punished but once for the misdemeanor, it does not thence follow that he may not be punished for the conspiracy. No case is cited by the court in support of this general remark: and it was not called for by the case. The cases cited by the counsel in the cause are far from sustaining

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the principle. The *King v. Sharpless*, (1 Leach, 108,) and *King v. Charlewood*, (1 Leach, 456,) were two of the cases cited, both of which were indictments for larceny. The *King v. Doran*, (2 Leach, 608,) was another; where there were two indictments for the same offence; one for a misdemeanor at common law, and the other for the felony under the statute; and the court held that both could not be sustained; for the misdemeanor was merged in the felony. The case in Massachusetts, therefore, does not warrant the observation of the judge, that an executed conspiracy is merged in the misdemeanor which may be the object of it. No other case has been cited in support of the principle.

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Rex v. Sharpless, 1 Leach, 108. *Rex v. Charlewood*, id. 456. *Rex v. Doran*, 2 id. 608.

These views of the case have brought my mind to the most perfect conviction, that, as a general rule, a combination to effect an unlawful object injurious to an individual, certainly to a company so intimately connected with the public interest as was the Sun Fire Insurance Company, is an indictable offence; and that the object being unlawful, it was not necessary to set out, in the indictment, the means by which the conspiracy was executed; that the indictment in this case does in fact go farther, and sufficiently charges a conspiracy to commit an indictable cheat; and that, therefore, the object being criminal, it was unnecessary to have stated by what means it was to be effected; and that in either case the conspiracy is a substantive offence not merged by being executed; but punishable as a misdemeanor.

*These views have been strengthened by the second argument of the cause, and by further examination and reflection upon the subject. And notwithstanding it is my misfortune, in this instance, to differ in opinion from some of the members of the court, distinguished for the highest legal attainments, and for powers of mind capable of elucidating any subject; and for whose opinions I entertain an habitual and profound respect; still, the admonitions of conscience remind me, that I cannot, that I ought not, to yield my own judgment upon the subject, unshaken as it is, even by the weight of those opinions. Although a sense of duty,

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would always impel me to act in conformity to the dictates of my own understanding, however much I might distrust it under such circumstances, yet, in this case, it is a source of much satisfaction to be able to refer to the unanimous opinion of the supreme court, in support of the conclusion to which I have come.

The argument has been pressed upon the court with much earnestness, that if this view of the case is a correct exposition of the law, we have a crime vague, arbitrary and undefined, a form of indictment calculated to furnish no information to the accused, of the nature of the offence with which he is charged; and that such a crime and such a mode of administering criminal justice, are incompatible with the nature and spirit of our free institutions. That the argument has some weight if addressed to a proper tribunal, I am not disposed to deny; but that it is properly addressed to a court of justice, I do deny.

The common law of England is the law of this land by the express terms of our constitution. As it is written, whether in the severe language of denunciation against crime, or in the milder precepts of civil regulation, so it must remain until wiped away by constitutional enactment, or modified by legislative interpolation. It belongs not to courts of justice to obliterate or deface it.

Whatever may be our opinions as to what the law *should* be, ours is a single duty to administer it as we find it. If, then, the conviction in this case is warranted by that law, *which we are sworn to administer, we must affirm it, whatever may be the consequences to the individual concerned, or to the public as a precedent in other cases.

There can be no precedent so dangerous and destructive as that departure from precedent, which substitutes the arbitrary and capricious will of a court, for the known, settled and unbending rules of law upon which all depend for the enjoyment of life, liberty and property.

The clerk now called for the vote upon the question of *affirmance* and *reversal*, whereupon the same number of members voted for affirmance and reversal.

The court being thus equally divided, the casting vote the president was given, by which the

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Judgment below was reversed. (b)

(b) The legislature afterwards interfered in respect to some of the questions presented in this cause.

By the New Revised Laws of this State, (pt. 4, ch. 1, tit. 6, § 8, vol. 2, p. 691-2,) it is now enacted as follows: "If two or more persons shall conspire, either,

1. To commit any offence; or
2. Falsely and maliciously to indict another for any offence, or to procure another to be charged or arrested for any offence: or,
3. Falsely to move or maintain any suit: or,
4. To cheat and defraud any person of any property by any means which are in themselves criminal: or,
5. To cheat and defraud any person of any property by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences: or,
6. To commit any act injurious to the public health, to public morals, or to trade or commerce: or for the perversion or obstruction of justice or the due administration of the laws:

They shall be guilty of a misdemeanor."

By § 9, "No conspiracies, other than such as are enumerated in the last section, (§ 8 *supra*), are punishable criminally."

By § 10, "No agreement except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act beside such agreement, be done to affect the object thereof, by one or more of the parties to such agreement."

The above § 8, (with an additional subdivision not adopted, viz. "To defraud or injure any person in his trade or business,") were introduced and recommended to the attention of the legislature, in 1828, by the revisors, Messrs. Spencer, Butler and Duer, with the following remarks: "The preceding enumeration includes all the cases usually considered as conspiracies, except that of a conspiracy to injure an individual by means not in themselves criminal. The great difficulty in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud, by compelling a discovery on oath. It is a sacred principle of our institutions, that no man shall be compelled to accuse himself of any crime, which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal. Frauds and combinations to defraud, constitute the mass of equity business; and seldom is a case presented where there are not at least two parties to a fraud: The private remedy would thus be utterly destroyed in most cases. Under these circumstances and without reference to what may be supposed to be the existing

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law, the revisors have prepared the above section, as containing all that is expedient to be enumerated." Vid. the force of this objection farther considered, and sought to be refuted in the opinion of STREBBS, Senator, in the principal case, ante, 608-9. It may also be doubted whether the statute, even now, completely removes the objection, if it be one; for not only is a man exempt from accusing himself of a *legal* crime; but also of any thing which is morally degrading, (13 John. 82. 2 Yates, 429. 1 Browne's Rep. 276. 2 Yates, 334. 3 Yates, 615. 1 Pennington, 415. 2 Pennington 728.) It will doubtless be conceded of a combination to defraud, that it is disgraceful. A statute would, therefore, seem necessary to remove the latter clause of the rule, before the difficulty suggested by the revisors can be fully removed.

The revisors introduced the 9th section with this remark; "Necessary to put at rest the doubts and difficulties respecting the common law offences."

The 10th section, as originally introduced, required an overt act in all cases, not excepting a conspiracy to commit felony, arson or burglary.

The revisors introduced it with the following remarks: "By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offence of conspiracy is made to consist in the intent; in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of that interchange or agreement. Surely an opportunity for repentance should be allowed to all human beings; and he who has conspired to do a criminal act, should be encouraged to repent and abandon it. Acts and deeds are the subject of human laws; not thoughts and intents, unless accompanied by acts."

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*JOHN STAFFORD, by his guardian and next friend Spencer
Stafford, plaintiff in error.

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against

ELISHA KANE ROOF, defendant in error,

An infant having a general guardian, sold a horse belonging to him, the infant; but there was no proof that he delivered the horse with his own hand. The vendee afterwards offered to sell the horse. *Held*, that trover lay by the infant even before coming of age, without any demand of the horse from the vendee.

And per JONES, chancellor, the sale is void, no manual delivery being shown. The sale and actual delivery of a personal chattel by an infant is voidable before he attains the age of 21 years. Otherwise of land.

On error from the supreme court. (7 Cowen, 179, S. C.) John Stafford brought trover for a horse against Roof, in the C. P. of the city of Albany, called the mayor's court; and the cause was tried there in October, 1824. On the trial, the plaintiff below proved that in July, 1824, he owned the horse, and on the 28d of that month sold it to the defendant below; and took his note in these words: "For value received, I promise to pay John Stafford fifty dollars in liquor at my bar." On this note the following payments were endorsed by the plaintiff below. July 26th, 1824, \$4. Same day, \$1 25. July 30th, cash, \$5 50. August 4th, cash, \$18 00. August 7th, \$12 84. The defendant below also proved, that at the time of the purchase of the horse, the plaintiff below owed the defendant below between thirty and forty dollars for board, lodging, carriage-hire, and liquor. The plaintiff below proved that some time after the sale of the horse, the defendant below offered the horse for sale as his own property, to one John Griffith, who declined to purchase; and farther, that the plaintiff below was but 19 years of age at the time of the sale of the horse; that Spencer Stafford was his general guardian.

The defendant below moved for a nonsuit, on the ground that no conversion had been proved; and also on the ground that it was not competent for the plaintiff below to

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avoid his contract while yet under age. The motion was overruled; and the defendant below excepted.

*The defendant below then proved a receipt given by the plaintiff below, dated August 27th, 1824, during the pendency of the suit, in full of the note; and that the plaintiff below had disavowed the suit.

The court below charged that the plaintiff below had a right to bring his action while yet an infant; that the contract was void; that the defendant below was not entitled to have any of the payments made by him allowed, except such as were in necessities; and that the plaintiff was entitled to recover. The defendant below excepted. Verdict for the plaintiff below of \$55, upon which the mayor's court gave judgment. The defendant below brought error to the supreme court, who reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Upon which the defendant below brought error to this court.

The reasons for the judgment of the supreme court were now assigned, as in 7 Cowen, 180 to 185, S. C.

Jacob Lansing, for the plaintiff in error, made the following points: 1. The sale was void, there being no benefit or semblance of benefit to the infant; no evidence that the delivery of the horse by the seller to the buyer was personal, actual, or manual; and beside, the note was void as being within the spirit of the act regulating taverns. (1 R. L. 180, s. 14.)

2. The contract of sale was voidable by the infant during his minority.

3. The attempt to dispose of the horse by the defendant below was a conversion.

4. The dominion of all the infant's property was in the guardian; and the infant could do no act affecting the right to it without the guardian's consent.

A. Taber, contra.

JONES, Chancellor, said, it is true in general that the

deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by "manual delivery"; but the distinction is now discarded, and the same effect is given to both.

They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only while he is within age.[1] He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of *Zouch v. Parsons*, (3 Burr. 1794.) Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall set up to the principle of protection much more effectually by

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A contract by an infant, accompanied with delivery by his hand, is voidable, not void, whether it be beneficial to him or not. But actual delivery must be shown. It cannot be inferred from the possession of the vendee of an infant.

An infant may avoid a sale of his chattels, which is voidable, before he attains the age of 21. Otherwise of his real estate.

[1] *Bool v. Mix*, 17 Wen. 149. *Stecum v. Hooker*, 43 Barb. 536.

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allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this; that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the mean *time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law, gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Whether an
infant can
bind himself
by any con-
tract of sale
during his
wardship?
Quere.

Beside, in this case the infant had a general guardian. It may well be doubted whether he could make any contract of sale which should bind him, for any purpose, during his wardship.

STEBBINS, Senator. Whatever may be the correct opinion (and I am not prepared to express any) upon the question discussed by the supreme court in this cause, and in the opinion of his honor the chancellor, as to the right of an infant to avoid, during his minority, a sale of property made by him, there is another point upon which I must place my vote.

Case stated.

The plaintiff brought his action of trover against the defendant in the mayor's court, for the horse which he had sold him during his infancy, and recovered. The defendant took a bill of exceptions upon the ground, among others, that no conversion was proved.

The cause coming before the supreme court upon this bill of exceptions, the judgment is reversed, for the reason that the plaintiff, being an infant, could not legally avoid his contract of sale, until he should become of age. This court is possessed of the cause upon a writ of error brought to reverse the judgment of the supreme court, and to restore to the plaintiff his judgment obtained in the mayor's court.

It is obvious, therefore, that if no conversion of the horse was proved in the mayor's court, the judgment of that court ought to have been reversed by the supreme

court, for that reason as well as for the reason assigned by them; and if the exception was well taken by the defendant, the judgment of the supreme court ought now to be affirmed.

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The only evidence of conversion is, that the defendant upon one occasion, offered to sell the horse; and this, in my judgment, does not amount to a conversion. There is no evidence of any tortious taking, or demand and refusal.

A mere offer to sell an article of personal property is not a conversion.

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The defendant came into possession as a purchaser. The sale was not void, but voidable by the infant; and conceding, therefore, that he may avoid it before coming of age, it is certainly good until avoided; and the possession of the defendant must have been rightful until such avoidance. His offer to sell, then, can be no conversion.

Where an infant makes a voidable sale of goods, he cannot bring trover till demand and refusal, unless there be an actual conversion by the vendee.

The first evidence, or notice of his election to avoid the contract which the plaintiff seems to have given, was the commencement of this suit. I think he should first have given notice of his election to avoid the contract, and demanded the horse, and waited for a refusal to deliver, as evidence of conversion, before he commenced his prosecution; and for this reason I am in favor of affirming the judgment of the supreme court.

JONES, Chancellor, said his attention had been mainly employed upon the question discussed by the supreme court. He had attended but slightly to that branch of the case examined by the honorable senator; nor did he feel prepared to express himself strongly upon the question whether an offer to sell a chattel by one who comes lawfully into the possession of it, shall be holden a conversion. He inclined to think that it was an act of such control, inconsistent with, and in defiance of the rights of the true owner, as to be, *prima facie*, evidence of a conversion.

But here is a sale set up as having been made by an infant under the care of a general guardian, and accompanied with no evidence whatever of a manual delivery by the ward. He had remarked that such a delivery cannot be intended, though it would be otherwise in the case of an adult. It then stands before us, at best, as

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an infant contracting to sell; and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself.

[*631] He was of opinion, on the whole case, that the judgment of the supreme court should be reversed.

For reversal,
13.

For reversal, THE CHANCELLOR, ALLEN, GRAY, ELSWORTH, ENOS, GARDINER, HAIGHT, HART, JORDAN, LAKE, McMARTIN, WATERMAN, and WILKESON, Senators.

For affirm-
ance, 7.

For affirmance, BURROWS, DAYAN, McCALL, NELSON, OLIVER, SMITH and STEEBINS, Senators.

Judgment reversed.

ABRAM ALLEN, survivor of Ephraim Allen, deceased
plaintiff in error,

against

ANTHONY I. BLANCHARD, defendant in error.

Partners in the practice of physic are within the law merchant, which excludes the *jus accrescendi* between traders.

The widow of a deceased partner is not a competent witness for the surviving partner, in an action by him as such.

Nor will a release from her to him of all her interest in the particular claim render her competent. Whether such a release would bar her claim to a share of the sum recovered, it not being to the personal representatives of her husband? *Quere*.

Where a suit is brought by a surviving partner as such, if he fails, the estate of the deceased partner is liable to contribute to the costs; and the assets of a deceased partner are liable for the debts of the firm, if they cannot be collected of the survivor.

On error from the supreme court. Abram Allen, as survivor of Abram & Ephraim Allen, two partners in the practice of physic, sued Anthony I. Blanchard in a justice's court of the county of Washington; and declared as such survivor, for medicine and attendance by the firm, in the life time of Ephraim. Plea, *non assumpsit*. Judgment for the plaintiff; from which the defendant appealed to the C. P. On the trial there, Marian Allen, the widow

of Ephraim Allen, was offered as a witness for the plaintiff; but objected to by the defendant as interested. She then released Abram Allen, the plaintiff below, thus: "of and from all and every sum or sums of money which he may recover or obtain, by suit or otherwise, from Anthony I. Blanchard, and which he the said *Anthony may owe to the said Abram Allen, as survivor of A. & E. Allen, as partners in the practice of physic and surgery, and which, but for this release, I might be entitled to as the widow of the said Ephraim Allen, deceased. The release was objected to as insufficient to render the releasor a competent witness; and the court of common pleas sustained the objection. The plaintiff below offering no further evidence, the C. P. directed the jury to find for the defendant below, which they did. The plaintiff below excepted to the decision excluding the witness; the cause was brought to the supreme court, by writ of error in behalf of the plaintiff below; and that court affirmed the decision of the C. P. He then brought error to this court.

The reasons for the decision of the S. C. were now assigned as follows, by

SUTHERLAND, J. The custom or law of merchants, excluding survivorship, extends to all traders. Whenever there is a joint undertaking in the way of trade, &c. the *jus accrescendi* has no application. Thus in *Jeffereys v. Small*, (1 Vern. 217,) two persons having jointly stocked a farm, and occupied it as joint tenants, a bill was filed to be relieved against survivorship, one of them being dead. The lord keeper said, if the farm had been taken jointly by them, and proved a good bargain, then the survivor should have had the benefit of it; but as to a stock employed in the way of trade, that should in no case survive. (Coke Lit. 182, a. Lit. s. 282. Viner's Ab. Survivor (D.) Jac. Law Dic. Joint Tenancy, &c.) (c.) The action survives,

(c) Elliot & Brown had a joint demise of a farm the profits of which they divided annually. Held, on the death of Elliot, that his moiety went to his executors. (Executor of Elliot v. Brown, Cor. Ld. Thurlow, July 25th, 1791, 1 Raithb. Vern. 217, note 3.

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though the interest does not. (Watson's Law of Partnership, 298, 450, &c.) The declaration states the defendant below, to have been indebted to the plaintiff, as survivor of Ephraim Allen, for medicine and attendance, &c. This is sufficient to constitute them merchants or traders, so as to exempt them from the operation of the *jus accrescendi*, which is now regarded as odious. *A moiety of the recovery, then would belong to the estate of the deceased partner, of which his widow would be entitled to her distributive share. A witness is incompetent to increase the fund, out of which he may receive a dividend, or in which he may, in any way, participate. (1 Phil. Ev. 512. 5 John. 258, 427. 1 Mass. Rep. 239. 2 Day, 466. 1 Camp. N. P. C. 381. 2 Camp. N. P. C. 301. 2 New Rep. 331.)

The assets of a deceased partner are liable for the debts of the firm, if they cannot be collected from the survivor. (2 John. Ch. Rep. 508. 1 Cain. Cas. Er. 122.) But so far as the interest of the witness resulted from the tendency of her testimony to increase the fund in which she was entitled to share, it was capable of being removed by a release. The case of Wood v. Williams, (9 John. 123,) is precisely in point to show that the interest of the witness in this case might be released. It was a present right, to take effect *in futuro*, and such a right may be released. (Coke Lit. 265, a.) But here there was no privity between the witness and the plaintiff in the cause to whom the release was given; she could in no event have any claim or right of action against him, in respect to this demand. The personal representatives of the deceased partner were entitled to his share of what might be recovered, and it may admit of very serious doubt, whether the release would be available to the plaintiff, in an action brought by those representatives against him; and if it could not, it is very clear, that it could not prevent the widow from recovering her distributive share from the representatives of her husband. (Com. Dig. tit. Release, B.)

But if the plaintiff should fail in this action, the estate of the deceased partner would be liable to contribute to the

costs, and the witness, in that point of view, had an interest in the success of the suit, not effected by the release, and which, of course, rendered her incompetent. She was therefore properly rejected.

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S. *Stevens*, for the plaintiff in error, stated the following points.

1. The plaintiff is entitled, by the *jus accrescendi*, to all the partnership debts. Mariam Allen was, therefore, a competent witness without a release.

*2. If the witness had any interest in the subject matter of the suit, it was a present right to take effect *in futuro*; *such a right may be presently released; her release, therefore, rendered her a competent witness.*

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3. A possible or contingent interest may be released, and if the person to whom the release is made cannot take the thing released, the release will operate by way of extinguishment.

4. But the release from the witness in this case was operative to the plaintiff, and conveyed to him her right to that demand.

5. The *plaintiff* was, therefore, prosecuting the suit for his sole and only benefit, and he alone would be responsible for the costs if he failed.

J. *Willard*, contra, stated the following points :

1. The witness offered was interested, because in the event of the plaintiff's recovery, she, as widow of the deceased partner, would be entitled to one third part of the share belonging to the estate of her husband, by the statute of distributions.

2. The witness was interested, because, if the plaintiff failed in the suit, the costs consequent thereon would be a charge on the partnership fund, and would diminish, *pro rata*, her distributive share therein.

3. The interest could not be released, in the first case, because it is a mere contingent interest; and in the second, because the interest depending on the witness' loss, is not the object of a release from her.

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4. If the interest contemplated in the first point is susceptible of being released, it was not discharged by the release given in this case, it not having been given to a person capable of taking a release.

JONES, Chancellor, was in favor of affirming the judgment below, for reasons substantially the same as assigned by that court.

JORDAN, Senator, desired to be excused from giving any opinion, as he was counsel in a cause involving precisely the same question as this. But the court disallowed his excuse.

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For affirm-
ance, 10.

*For affirmance, ALLEN, DAYAN, ENOS, GARDINER, HAIGHT, JORDAN, MCCARTY, STEEDS and WATERMAN, Senators.

For reversal,
8.

For reversal, ELSWORTH, HART, LAKE, MCCALL, McMARTIN, SMITH, SPENCER and WILKESON, Senators.

Judgment affirmed.

JOHN PINNEY against ASA GLEASON. (a)

P. recovered in the C. P. against G.; who brought error to the S. C. who reversed the judgment of the C. P., and ordered a *venire de novo* in the C. P. In the mean time, P. had collected his judgment below. G. then took a writ of restitution, and an execution for his costs in the S. C.; and the money collected in the C. P. was restored, and the costs in the S. C. collected. G. then compelled P. by rule in the C. P. to go to trial on the *venire de novo*, who went on accordingly, and obtained a second verdict and judgment against G.: and then brought a writ of error from the judgment of the S. C. *Held*, that he had a right to his writ of error from the S. C.: that his proceedings in the C. P. were no waiver of his right to bring error: and per JONES, Chancellor, a reversal of the judgment in the S. C. will be a reversal of all the consequent proceedings, including those in the C. P. upon the *venire de novo*.

J. E. LEVERTT, for Gleason, moved that the writ of error

(a) 5 Cowen, 152 and 411, note, S. C. The present motion was decided at the July session of the court of errors, 1827.

in this cause from the supreme court, be quashed. The papers for the motion presented the following state of facts:

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Pinney sued Gleason in the C. P. of Onondaga county, on several notes, dated the 30th of June, 1820, for certain sums payable in salt at so much the bushel, at certain times. The cause was tried at the May term of the C. P., 1824, when a special verdict was found for the plaintiff (P.) and judgment rendered for him. Gleason brought a writ of error to the S. C., the writ being returnable at the October term, 1824; and that court reversed the judgment of the C. P. at their October term, 1825, (5 Cowen, 152, S. C. reported as affirmed; but corrected 5 Cowen, 411, note;) and ordered a *venire de novo* from the C. P. On the 23d. January, 1826, the judgment of reversal was perfected. Before the reversal, no bail in error being in, the judgment below was collected by Pinney; and on reversal, restitution was awarded, a writ of restitution issued, the money restored under it, and an execution for the costs in error was issued, and Pinney was compelled to pay them. After the reversal, and in pursuance of the order for a *venire de novo*, at the September term of the C. P., 1826, on motion of Gleason, that court made a rule against Pinney, the plaintiff below, for judgment as in case of nonsuit, for not proceeding to trial according to the course and practice of that court, with leave to stipulate to try at the next term, (January.) Pursuant to a stipulation, the cause was tried, and a verdict was again rendered for Pinney, the plaintiff below. The damages were assessed at \$100. This was at January term, 1827. Judgment was perfected on that verdict. Pinney then brought error to this court from the S. C.; a copy of an assignment of errors in this court was served by the attorney of Pinney upon Gleason's attorney, on the 2nd day of July, 1827.

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Lovett referred to *Hartshorne v. Slegt*, (3 John. 554,) as supporting this application in principle. He admitted that Pinney might have brought his writ of error to this court, from the decision made against him in the supreme court, had he proceeded in due season. But he first submitted to the restitution of costs and the damages collected

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upon his execution in the common pleas; and the collection of the costs of the writ of error. He then proceeds to avail himself of the reversal and *venire de novo*, obtains a second verdict, by which he hopes to conclude the defendant below; and then brings error to reverse the very proceeding of which he has taken advantage. He has made his election; and shall be bound by it. His legal right to a writ of error is wrested to the purpose of vexation and oppression; and may be met in a summary way, as the chancellor remarked in *Hartshorne v. Slegt*.

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H. Bleeker, contra. Gleason first recovered back his money under the judgment of the supreme court, reversing the judgment against him, and then drove Pinney to a new trial by a rule. He, then, had no election but to try or be nonsuited on the call of the very party who now complains that he is pursued by a writ of error. The question is, will this court allow the cause to go to a hearing, and determine whether there be error in the record? The statute (1 R. L. 194, § 7,) is imperative upon this court to examine all errors assigned in records brought here on writ of error; to reverse or affirm, and give such other judgment therein as the law shall require; and to send back the transcript of the record, and all things touching the same, for further proceedings in the supreme court according to the decision made here. By the same statute, any party aggrieved may bring error. Pinney is here damned to the amount of the sum restored, and the costs; and this, whatever common pleas may afterwards have done. I agree that if the judgment shall be reversed here, a difficulty will occur as to the new judgment in the common pleas; but may not the supreme court or common pleas exercise such a control over the whole proceeding as to prevent injustice? Cannot the supreme court give Pinney a writ of restitution for the costs of the writ of error collected of him by execution? And so of whatever he may appear to have lost by their erroneous proceedings? On the record going down from this court, the supreme court are, by the statute, to do what of right should be done.

But suppose we had not been compelled to proceed; suppose we had submitted and gone to trial without the rule taken against us by Gleason; even that would not have concluded us. It would only have been following up the decision of the supreme court, which we were driven to by that decision; and on reversing it, the whole proceedings consequent upon it, would fall with it. Suppose Gleason, instead of his writ of restitution, had brought his action for money had and received, to recover back what he had paid, as he might have done, according to *Clark v. Pinney*, (6 Cowen, 297,) and had collected money, even this would not have shut us from our writ of error, which would, on its being successful, overturn all the suits and judgments growing out of it. Error lies at any time within five years, the statute of limitations, (1 R. L. 134, § 9.) So where the money due in consequence of the reversal is voluntarily paid; this does not prevent the writ of error at any time within the five years.

ALBANY,
Dec. 1827.

Pinney
v.
Gleason

*635.

Lovett, in reply, said the now plaintiff in error should have retained the cause in the supreme court; and tried it at the circuit. This might doubtless have been done on his motion. The amount of his recovery would have carried costs in that court, who would then have retained the control of the whole matter. By proceeding in the common pleas he has taken away the power of the supreme court to do full justice in the event of a reversal. They cannot nullify the judgment which the plaintiff in error has obtained in the common pleas; and give him his rights in the event of a reversal.

JONES, Chancellor. The constitution and laws authorize this writ of error; and unless something has been done by the plaintiff in error to deprive himself of that right, he must go on. *Hartshorne v. Slight* was where this court had passed upon the cause on a bill of exceptions by the plaintiff, reversing the judgment, and ordering a *venire de novo*. On the new trial another bill of exceptions was taken, and error brought by the defendant. The bill

ALBANY,
Dec. 1897.

Pinney
v.
Glendon.

presented the identical point which had been before settled at the suit of the plaintiff. The court of errors were bound by the previous decision; but here we are not. We have never passed upon the point presented.

It is said the plaintiff in error submitted to, and followed up the decision of the supreme court; but he did not do this voluntarily. He proceeded to the trial in the common pleas with reluctance, and under a rule of the court obtained by his adversary. All was a consequence of the decision in the supreme court, as it was followed out and enforced by the defendant in error, and a reversal here on this writ of error will be a reversal of every thing; the second trial and judgment in the common pleas, as well as the judgment and proceedings of the supreme court, upon which it was bottomed. If we affirm the judgment of the supreme court, then every thing is right, provided the common pleas followed the principle of damages settled for them on the writ of error to the supreme court. The whole is one connected proceeding. The judgment of the supreme court stood on the same ground as an interlocutory decree of chancery. There the party may appeal in the first instance, or submit to all consequences; and then appeal from the whole. The proceeding in the common pleas does not relieve the plaintiff in error from his grievance by the judgment in the supreme court. Even an entry by a plaintiff in error, on land to which the judgment relates, will not deprive him of his right to proceed. It will be in the power of this court to give such directions in respect to the whole proceedings as justice shall require. The plaintiff in error has, at all events, a right to prosecute his writ in order to get back the costs of the writ of error to the supreme court, which he has been obliged to pay, as well as to recover his own costs in that court.

Motion denied.

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FREDERICK CLEVELAND, plaintiff in error,
against

HUGH FARLEY, defendant in error.

ALBANY,
Dec. 1827.

Garey
v.
The People.

Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the statute of frauds, (1 R. L. 78, s. 11,) though the original debt still subsist, and remain entirely unaffected by the new agreement. Thus, where M. owed F.; and C., in consideration that M. delivered him (C.) hay to the value of the debt, promised by parol to pay F.; held, that this promise was not within the statute.

On error from the supreme court. 4 Cowan, 482, S. C. by the title of Farley v. Cleveland.

The case was argued here by

J. Willard, for the plaintiff in error, and

D. Russell & Z. R. Shipherd, contra.

*JONES, Chancellor, examined the question decided below; and was of opinion that the judgment should be affirmed. [1] Whereupon,

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Per totam curiam,

Judgment affirmed.

DAVID GAREY, plaintiff in error,

against

THE PEOPLE, ex rel. Justus Ingersoll, defendants in error

The legislature have no power to shorten the constitutional term of office of a justice of the peace.

This cannot be done indirectly by the erection or division of counties.

Where a town is transferred from one county to another, or a new county made out of several towns, the justices of these towns continue to hold their offices, as justices of the same town or towns in the new counties.

The office of justice of the peace is, under the new constitution and the statute which it adopts, (sess. 41, ch. 60, § 2,) a town office, though it has county powers.

[1] See *Gallego v. Brunel*, 6 Cow. 350, 3d ed., note 1.

ALBANY,
Dec. 1827.

Law
v.
Jackson.

On error from the supreme court, 6 Cowen, 642, S. C. by the title of *The People, ex rel. Ingersoll, v. Garey.*

The cause was argued here by

J. V. Henry, for the plaintiff in error, and

Talcott, (attorney general) contra.

JONES, Chancellor, delivered an opinion in favor of affirming the judgment below; with whom ALLEN, Crary, DAYAN, ENOS, GARDINER, HAIGHT, HART, JORDAN, LAKE, McMARTIN, NELSON, OLIVER, SMITH, STEBBINS, WATERMAN and WILKESON, Senators, concurred.

For reversal, BURROWS, ELSWORTH, McCALL and McCARTY, Senators.

Judgment affirmed.

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*JOHN LAW and ANDREW NELSON, plaintiffs in error,
against

JAMES JACKSON *ex dem.* Jacob Lansing, defendant in error.

A tender of money due upon a judgment, does not, *per se*, discharge it, or take away the lien of the judgment creditor; but he may still redeem upon it as a judgment creditor, within the statute, (secs. 43, ch. 184, s. 2.) [1]

On error from the supreme court. 5 Cowen, 248, S. C. by the title of *Jackson, ex dem. Lansing, v. Law and Nelson.*
The cause was argued here by

J. Crary & D. Russell, for the plaintiffs in error, and

Jacob Lansing & S. M. Hopkins, contra.

JONES, Chancellor, delivered an opinion in favor of affirming the judgment below.

[1] *People v. Beebe*, 1 Barb. S. C. E. 385. *Ex parte The Peru Iron Co* 7 Cow. 549.

ALLEN, BURROWS, ELSWORTH, ENOS, GARDINER, HAGER,
HAIGHT, HART, JORDAN, LIVINGSTON, MCCARTY, McMARTIN,
SMITH, SPENCER, and WATERMAN, Senators, concurred.

ALBANY,
Dec. 1827.

Law
v.
Jackson.

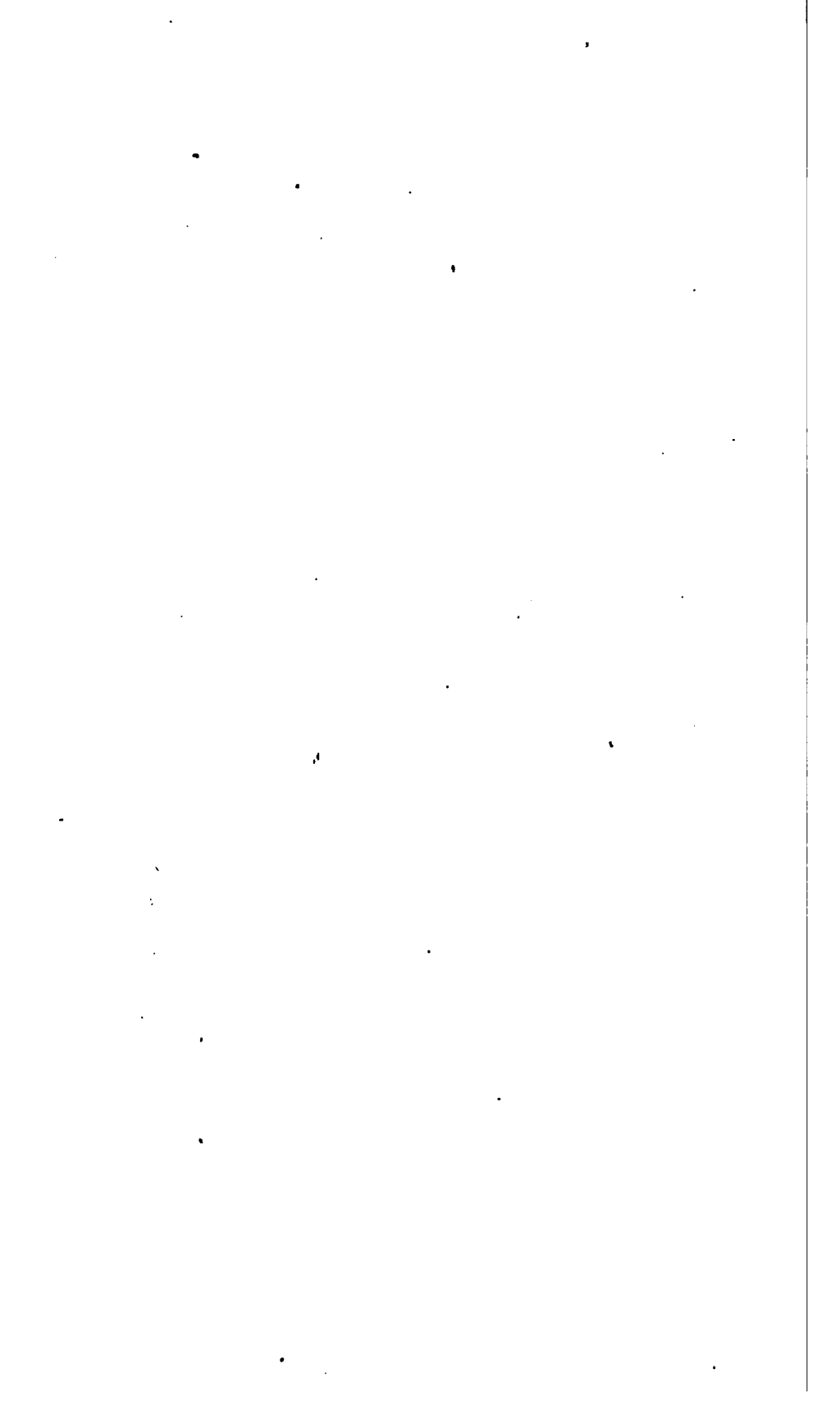
For reversal—DAYAN, LAKE, MCCALL, OLIVER and
WILKESON, Senators.

Judgment affirmed.

END OF CASES IN ERROR.



CASES
IN THE
SUPREME COURT

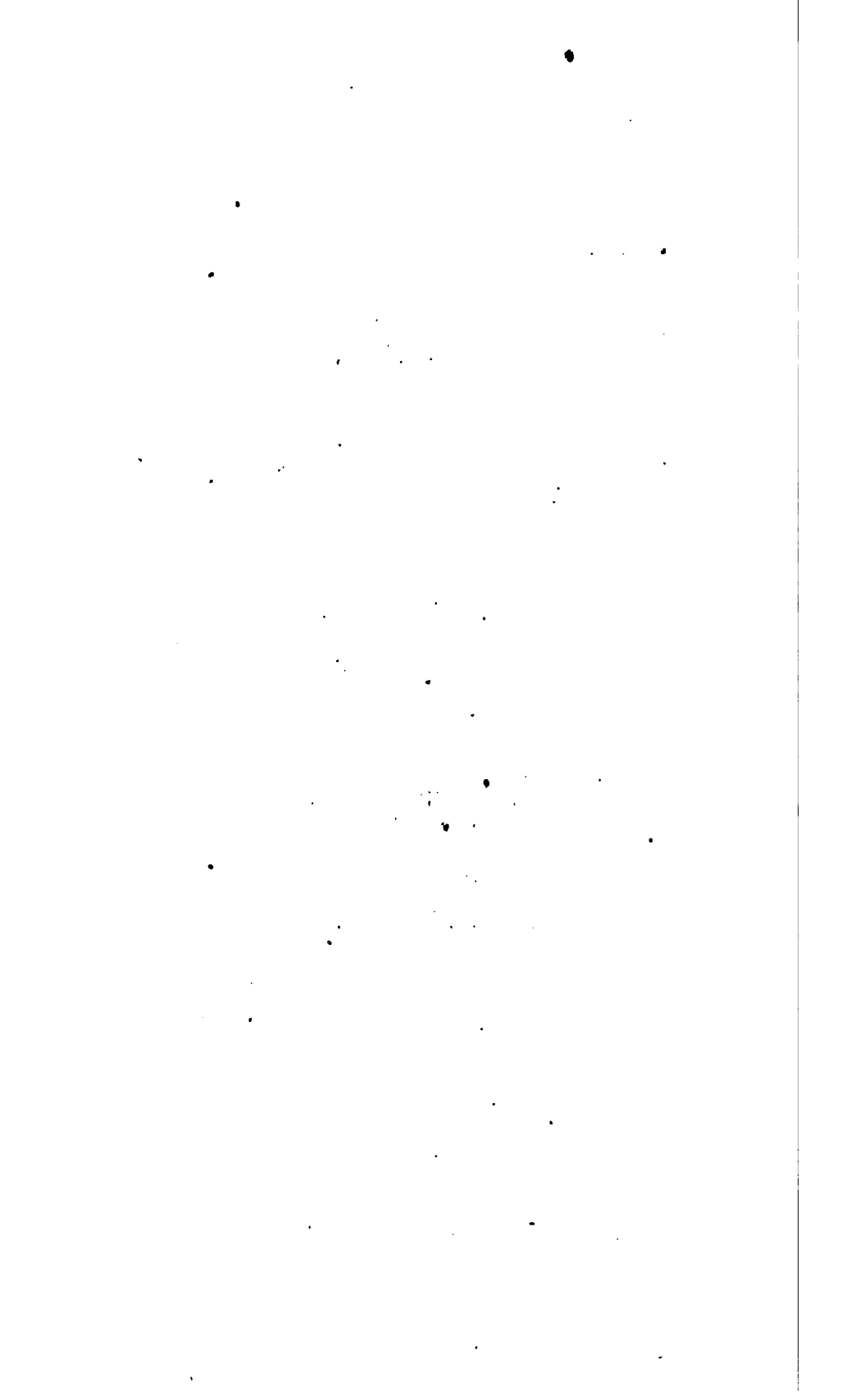


JUDGES
OF
THE SUPREME COURT
OF THE
STATE OF NEW YORK,

DURING THE TIME OF THE FOLLOWING REPORTS.

JOHN SAVAGE, *Chief Justice.*
JACOB SUTHERLAND, } *Justices.*
JOHN WOODWORTH, }

SAMUEL A. TALCOTT, *Attorney-General.*



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

REED *against* SMITH. (a)

CASE, upon verdict, subject to the opinion of the court, before his honor Mr. Justice WOODWORTH, Albany circuit, Oct. 3d, 1821,

The action was assumpsit on a promissory note by E. Reed, the last endorsee, against Smith, his immediate endorser. The note was for \$800, dated May 29, 1819, made by D. Parker, and endorsed by five several persons. The formal proceedings to charge the endorser being admitted, the only question was whether this note was usurious. On this subject the proof was, that in April 1816,

maker, being pressed for money, applied to the plaintiff for the hire of \$800. The plaintiff said he had not the money, but he thought he could procure it of Roswell Reed, his son-in-law, whose rule, however, he believed it

Where E. was applied to by P. for a loan of money, but not having it, referred P. to his son-in-law, whose usage he said it was to receive 7 per cent. besides legal interest; and by arrangement between himself and P. received P's note with an endorser and procured the money of his son-in law, at the rate mentioned by him

on his own note, which he afterwards paid, and gave P. credit from time to time on P's successive endorsed notes, holden by E. himself; *held*, that E. must be considered the lender; that he did not stand in the light of a mere surety of P., and that the notes taken by him were void.

Where the original loan is usurious, all the securities therefor, however remote or often renewed, are void.

Where one, as agent, lends money for another, at an usurious rate of interest, and afterwards pays him, and takes security from the borrower in his own name, it is void, though he derive no benefit from the loan, and the premium go to the exclusive benefit of the principal.

It would be void even in the hands of a *bona fide* holder.

Whether a surety knowingly becoming bound for, and paying an usurious loan, may recover over against his principal? *Quærs.*

(a) This cause was decided May term, 1823.

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May, 1823.

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v.
Smith.

was to take a premium of 7 per cent.; though if he had the money to lend himself, he should charge but 7 per cent.; it being contrary to his principles to take usury. The maker said he was willing to give the per cent.; and a few days after left his note for \$800 with the plaintiff, endorsed by Amasa Parker, payable February 1st, 1817. The note was to be returned, if the money could not be procured. This was on Friday evening or Saturday morning, of the week next ensuing the first application for the money. On the same Saturday, R. Reed delivered \$744 to a messenger sent by the plaintiff to receive it, who paid it to Stoddard Smith the agent of Parker, the maker, from whom Parker received it. The money had been raised on the plaintiff's note of \$800 left with R. Reed, and which was endorsed by him, and discounted at the bank of Columbia, at the usual rate. It was not left with him for discount, but he assumed this risk, and on its falling due, paid the money himself, as endorser to the bank. The plaintiff afterwards, and within about a year from the time of the loan, paid R. Reed the \$800; so that R. Reed, and not the plaintiff, had the premium. R. Reed told the plaintiff, on receiving his note, that if he would send him Parker's note guaranteed by certain persons, whom he named, he would deliver back the plaintiff's note. This guaranty was afterwards drawn and signed, dated 28th October, 1816; but neither this nor Parker's note were ever delivered to R. Reed. Both remained with Abijah Reed, one of the guarantors; so that R. Reed's only security for the money was the plaintiff's note. Shortly before Parker's first note became payable, he requested the loan of the money for another year, which the plaintiff granted on a substituted note for \$800, with an additional endorser. This note was continued down by the like renewals, from time to time, to the note on which this action was brought.

Van Dyke & Bronk, for the plaintiff, insisted that R. Reed must be considered the lender of the money. Could Parker have supported a suit under the statute, against the

plaintiff, for the premium? R. Reed received this premium. The plaintiff was the mere agent and surety of Parker. His liability to R. Reed would have been a good consideration for Parker's original note. And this case is still stronger. The note now in question is for money paid by the plaintiff for Parker's use, and at his request. (a) That it was paid at Parker's request, is evident from his renewal of the note, and may be inferred from the beneficial nature of the consideration. (b)

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(a) 19 John.
147. 2 Taunt
184.

(b) 14 John.
192.

It may be said that the plaintiff, though a surety, should have resisted the payment on the ground of usury. Some old cases may be cited to show this. But these were suits upon indemnities, executed *before* the payment of the money by the surety, and are confined to the original indemnity. Besides, it is by no means clear that the plaintiff knew of the usury.

In this case the doctrine applicable to endorsees against endorers ought to apply. (c)

(c) 2 Str
1155. Doug
744.

E. Williams, contra, insisted that this was a plain case of usury, as between the plaintiff and Parker. The excuse for demanding usury is the trite and threadbare one: "I have not got the money; but I think I can procure it of R. Reed, my son-in-law." "What if I have not got 3000 ducats in store: Tubal, a rich brother of our tribe has the money." (d) Shakspeare had read the plaintiff if he had never read Shakspeare. The agreement for the money, and the subsequent negotiation, and extensions of credit, are all with the plaintiff. He procures the money. No matter whether he puts the premium into his own pocket or that of his son-in-law

(d) Merchant
of Venice, act
1, scene 3.

That the plaintiff was the agent through whom R. Reed made the loan can make no difference. Nor will an agreement, that he should pay Roswell, and become himself the principal, alter the character of the transaction. A security originally void for usury, cannot derive any operation from any future act or event. (e)

(e) Ord, 105
Day's ed.

The plaintiff never was the surety of Parker. But if R. Reed had been the original usurious creditor of Par-

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(f) 3 T. R.
537, 8 id. 390.
3 Esp. N. P.
Rep. 22.

ker, the debt being transferred to the plaintiff, with a full knowledge of the usury, the note would be equally void in his hands. (f)

**Curia per SUTHERLAND, J.* The note upon which this suit is brought, is most clearly a continuation of the original note, given in April, 1816, when the loan was obtained by Parker. If that note, therefore, was given upon a usurious consideration, the taint which it imbibed attached to each of the series of securities which were subsequently taken, and affects and destroys the one in question.

It is admitted that Parker paid a premium of seven per cent. upon the \$800, over and above the legal interest. But it is contended on the part of the plaintiff, that the loan was made by Roswell Reed, and that the plaintiff acted merely as the agent of Parker in effecting the loan.

The facts are these: Parker applied to the plaintiff for a loan of \$800. He told him he had not the money, but he thought he could procure it for him from his son-in-law, Roswell Reed; but that it was Roswell's practice to charge a premium of seven per cent. beyond the legal interest upon all his loans. Parker agreed to pay the premium, if the money could be procured. The plaintiff then sends his own note for \$800 to Roswell Reed, which Roswell procures to be discounted in the Bank of Columbia, and delivers \$744 of the proceeds to a special messenger sent by the plaintiff to receive it, who pays it to Stoddard Smith, the agent of Parker, who had previously agreed to forward it to him. The plaintiff, the day before, or on the morning of the same day, had received from Smith the note of Daniel Parker for \$800 endorsed by Amasa Parker, under an agreement to return it, if the money could not be procured.

Upon this statement of facts, is there the slightest room to doubt that the loan was in truth made by the plaintiff, and not by Roswell Reed? The money was procured upon the note of the plaintiff. Parker's note was delivered to the plaintiff, and never was in the possession of Roswell Reed; all the negotiation for the extension of the credit and the renewal of the notes, were conducted by the plaintiff

solely, without any reference to Roswell. He was the person, therefore, who made the loan; and how, or where he procured the money, and what disposition he made of the premium; *whether he put it in his own pocket, or into the pocket of his son-in-law, is perfectly immaterial.

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But the result will be the same if we consider the plaintiff as the agent of Roswell Reed in the transaction. The note was unquestionably given for the loan of \$744. It contained a premium of \$56 and was therefore usurious, to whomsoever it belonged, and would be void even in the hands of a *bona fide* holder: much more so in the hands of the plaintiff; who, if he purchased it from Roswell, and paid the face of it, purchased it with a full knowledge of the usury attached to it.

The only supposition upon which the usury can be got rid of is, that Parker's note was not given for the loan. But was given in payment of the \$800, which the plaintiff had paid Roswell Reed. Every fact in the case is at war with such a supposition. The plaintiff did not pay Roswell Reed, until about a year after the loan was made. But Parker's note was given either the day before or the very day that he received the money. It could not, therefore, have been given in satisfaction of an advance which had not then been made. (a)

In every point of view, I consider this one of the clearest

(a) Mr. Ord, in his valuable treatise on usury, (p. 64 to 69,) gives the most usual expedients by which usurers have attempted to evade the statute, but he has not adverted to the one presented by this case, which is now perhaps as frequent as any, viz: the lender placing himself in the light of the agent and surety of the borrower, and taking a counter security, as an indemnity for the money which he has paid, or is liable to pay under pretence of being surety. In these cases, if the state of the proof be such as to disclose the real lender, like this one of *Reed v. Smith*, there is, of course, no difficulty in making out the defence. The idea of usurers is most probably founded on a class of cases, collected in Ord, 100, which decide, that such a counter security is good, notwithstanding the original security should turn out to be usurious. But Mr. Ord holds, that, even in such a case, the counter security is void, where the surety *knows* of the usury, as he must do where he is an agent in making the loan, and he thinks that Potkin's case in 3 Leon. 63, was determined upon this distinction: and is, therefore, reconcilable with the other cases, which it seems to contradict.

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May, 1823.

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v.
Rockwell.
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cases of usury that was ever presented to a court of justice and if the miserable contrivance which has been resorted to to screen this transaction from the operation of the statute, should prove effectual, either the law itself, or the administration of it, would be brought into deserved dishonor.

Judgment for the defendant. (b)

(b) If A. lend money to B. who puts it out to usurious interest, and agree to pay to A. the same rate of interest which he is receiving upon A's money, this is usury between A. and B. and an endorser of B's note to A. may avail himself of the plea of usury. (*Levy v. Gadaby*, 3 Cranch, 180.) But where A. having given a usurious security, paid the amount thereof to B. who was surety for him, and B. in consequence of such payment, gave his own note to the creditor for the same amount; held, that the latter note was not usurious. (*Scott v. Lewis*, 2 Con. Rep. N. H. 132.)

In debt for \$250, the penalty of articles of agreement, the defendants demurred to the declaration and had judgment against them; with leave to withdraw the demurrer, and plead on payment of costs. Held, that these should be supreme court costs, as on a judgment against the defendants, the nominal damages might be added, which would carry the sum over \$250.

It seems that final judgment on a plea to a declaration on a writing obligatory should not be for damages as such; but simply for debt and costs. Note (a)

HULIN against ROCKWELL and OTHERS. (a)

In debt for the penalty of \$250 in articles of agreement. The defendants demurred to the declaration; and had judgment against them on the demurrer, with leave to withdraw the demurrer, and plead on payment of costs.

The question was submitted, whether these should be supreme court or common pleas costs.

J. Bloore for the plaintiff, cited 1. R. L. 343, '4, s. 1 & 4. He said these sections allowed supreme court costs where the principal recovery exceeds \$250. In this case the nominal damages of six cents must be added. (2 John. Cas. 406, 409.)

G. W. Kirtland, contra, cited 3 Cowen, 151; 1. R. L. 344; 2 Cowen, 412, 5 id. 424; 13 John. Rep. 345.

Curia. The plaintiff is entitled to supreme court costs. If the penalty were more than \$250, there would be no

(a) This case was decided October term, 1827.

*doubt. To satisfy the statute in this case, the nominal damages may be added. (b)

NEW YORK,
May, 1824.

Jackson
v.
Leonard.

(b) i. e. They would be added, on the defendant's having a judgment against him, which, of course, must be the criterion as to the rate of these interlocutory costs; i. e. whether they shall be S. G. or C. P. costs. Had the judgment been perfected on the demurrer, the plaintiff would have recovered damages as such. (Trin. 11 Car. rot. 323, Book of judgments, 30.) But by the book of judgments, Trin. 44, Eliz. rot. 715, Oct. Hill. p. 158, damages distinct from costs are not given in a judgment for the plaintiff, on demurrer to a plea in bar to a declaration in debt on a writing obligatory; and so the case would be within *The People v. Hallett* (4 Cowen, 67), which was final judgment in debt by default.

N. B. The marginal note to the principal case was discovered to be wrong after it had passed the press. It should read as upon demurrer to the declaration; and the clause stating the year should be stricken out.

JACKSON, ex dem. BALDWIN against LEONARD. (a)

EJECTMENT for part of lot No. 4, in the town of Ovid, in the county of Seneca, tried at the circuit in that county, June 3d, 1822, before PLATT, late J. of the supreme court.

On the trial, the plaintiff having deduced a regular paper title from the state to himself, the defendant relied for his defence on an adverse possession of 20 years before suit brought; and he showed that one Bryant took possession of the lot 4, in 1796, and obtained a deed for it in 1796, of one Jackson. Bryant continued in possession till about 1805, when M. Pitney, the father of Aaron & Joseph T. Pitney, claimed the whole lot; and Bryant compromised with M. Pitney, surrendering part of the lot to him, and retaining another part to himself. The defendant went into possession six or seven years before the trial, under a

Adverse possession for 20 years, by several successive persons, in order to bar an entry, must be continued by a regular chain of privity between them. Where one entered, and then another claimed adversely to him, and took possession under such claim by consent of the first possessors pursuant to a compromise between them; held, that this was not a continuity of the first possession within the rule.

(a) This case was decided in May term, 1824.

NEW YORK,
May, 1824.

Jackson
v.
Leonard.

quit-claim deed from Joseph T. Pitney, who derived title from his father.

The judge expressed his opinion to the jury, that the evidence adduced on the part of the defendant established such a possession adverse to the plaintiff's title, for more than twenty years, as, in law, would bar the entry of the plaintiff; and the jury found for the defendant.

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**H. R. Storrs*, for the plaintiff, moved for a new trial, on the ground that the defendant, and those through whom he claimed, had not made out a continued adverse possession of 20 years. He said Bryant's title could not be connected with M. Pitney's, who claimed adversely to B. There was no privity between them. The former claimed, and came in under a title paramount to B's.

D. Cady, contra.

Curia, per SUTHERLAND, J. The charge of the judge was erroneous. Leonard, the defendant, showed nothing like an adverse possession for 20 years. He purchased of Joseph T. Pitney only six or seven years before the trial, and then entered upon the lot for the first time. Bryant swears expressly that he never sold to Leonard, or put him in possession of any part of the lot. Whether Bryant, or those claiming under him, could protect themselves on the ground of adverse possession, is not material; for there was no privity between them and the defendant; and no continuity of Bryant's possession is shown.

In *Brandt v. Ogden*, (1 John. Rep. 159,) *Spencer*, J. says, "Smeed's possession is not connected with that of Wing, nor is the defendant's with that of Smeed. There is no *continuity of possession*. Under these circumstances it cannot be pretended that this is an adverse possession of twenty years." So in *Doe v. Campbell*, (10 John. 477,) the court say, "but the decisive objection to this defence (of adverse possession) is, that no regular deduction of title, or privity and continuity of possession, was shown and deduced down from Smith to Elliott, or to any of the

other defendants. Adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing." [1]

ALBANY,
August, 1821.
The People.
v.
Santvoord.

New trial granted.

*THE PEOPLE *against* PETER VAN SANTVOORD and GILBERT OAKLEY. (a)

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[Before SPENCER, Ch. J., and VAN NESS, YATES, PLATT and WOODWORTH, Justices.]

. At the general session in Saratoga county in May, 1821, the prisoners, Van Santvoord and Oakley, were jointly indicted for forgery. The indictment charged the forgery to have been committed more than three years previous to the finding of the indictment; so that on the face of the indictment, the time limited for the prosecution for penal offences by the statute (sess. 24, ch. 183, s. 7, 1 R. L. 187,) appeared to have elapsed before the indictment found.

At the oyer and terminer in Saratoga, on the 2d of June, 1821, (WOODWORTH, J. presiding,) the prisoners were separately tried on their plea of not guilty, and convicted on this indictment. And the fact that the crime appeared by the indictment to be barred by the statute being mentioned to the court, they suspended the sentence with a view that the point might be presented to the supreme court.

Accordingly Mr. Warren, the district attorney, made out and sealed a writ of *certiorari*, (b) to remove the rec-

Semb. the time of committing an offence laid in an indictment is, in general, wholly immaterial, and any other time may be proved.

Though an indictment lay the time so long before the indictment is found, that the crime appears to be barred by the statute of limitations, this is no ground for arresting judgment. [2]

Practice and practical forms of removing an indictment from the oyer and terminer to the supreme court, after conviction, where a question of law is reserved at the trial, and the convict is in prison. Vide notes (b) (c) and (d) in connexion with the principal case.

(a) This cause was decided at August term, 1821.

(b) This writ was as follows:

The people of the state of New York, to our Justice and Judges assigned to

[1] *Humbert v. Trinity Church*, 24 Wen. 586. *Simpson v. Downing*, 23 Wen. 316. *Jackson v. Phillips*, ante, 94.

[2] But see *State v. Beckwith*, 1 Stew. 318. • *Shelton v. State*, 1 Stew. & Port. 208. *State v. Roach*, 1 Hayw. 260.

ALBANY,
August, 1821.

The People.
v.

Santvoord.

and from the oyer and terminer, and a writ of *habeas corpus* (c) directed to the sheriff of Saratoga, both returnable on the first Monday of August (at August term) thereafter. These being allowed, Mr. Justice Woodworth made a return to the writ of certiorari; and the sheriff having brought the prisoners into court upon the *habeas corpus*, (d)

hold our court of oyer and terminer as goal delivery, in and for our county of Saratoga, and to every of them, Greeting:

We, being willing, for certain reasons, that all and singular indictments, records and convictions, of whatsoever felonies whereof Peter Van Santvoord and Gilbert Oakley are indicted and convicted before you, be determined before our justices of our supreme court of judicature, and not elsewhere, do command you, and every of you, that you, or one of you, do send, under your seal, or the seal of one of you, before our said justices on the first Monday of August next, at the capitol in the city of Albany, all and singular the said indictments, records and convictions, with all things touching the same, by whatsoever name the said Peter Van Santvoord and Gilbert Oakley are called in the same, together with this writ, that we may further cause to be done therein what of right, and according to law, we shall see fit to be done. Witness Ambrose Spencer, Esq., Chief Justice, at the city of New York, the nineteenth day of May, in the year of our Lord one thousand eight hundred and twenty-one.

Fairlie, Bloodgood & Breece, Clerks.

Warren, Dist. Atty.

(c) This writ was as follows:

The People of the state of New York, to our Sheriff of our county of Saratoga,

Greeting:

We command you, that you have before our Justices of our supreme court of judicature, on the first Monday of August next, at the capitol in the city of Albany, the bodies of Peter Van Santvoord and Gilbert Oakley, being committed and detained in our prison under your custody, as is said, together with the day and cause of the taking and detaining of the said Peter Van Santvoord and Gilbert Oakley, by whatever names the said Peter Van Santvoord and Gilbert Oakley may be called in the same, to undergo and receive all and singular such things as our said court shall then and there consider of them in that behalf, and that you have then there this writ. Witness Ambrose Spencer, Esq., Chief Justice, at the city of New York, the nineteenth day of May, in the year of our Lord one thousand eight hundred and twenty-one.

Fairlie, Bloodgood & Breece, Clerks.

Warren, Dist. Atty.

(d) That this is the correct practice in all the numerous cases which come of suspending sentence on account of doubt or difficulty at the oyer and ter

H. B. Davis, for the prisoners, now moved in arrest of judgment. He said this is not an offence indictable after three years from the time of its commission. The indictment, "therefore, defeats itself. To be good, it must show an indictable crime on its face. (5 East, 244.) It has been often held, that although the particular day is not material in an indictment, yet where the law makes time material to the offence the day must be laid within that time by the indictment. Thus, in *The King v. Stevens & Agnew*, (5 East, 244,) which was the case of an indictment for receiving presents under the statute, (33 Geo. 3, c. 52, s. 62,) while holding or exercising an office in the East Indies, it was agreed, the indictment having recited that the defendants held their offices from such a time till the 29th of November, 1795, it must lay the offence on a day within the time recited. And *Ld. Ellenborough, C. J.* who delivered the opinion of the court, supposes, that, in an appeal of murder, it is necessary, where the stroke is laid on one day, and the death on another, to lay the latter day as within a year and a day of that on which the stroke is charged to have been given; otherwise the crime is not made out. (5 East, 249.) In *Baynham v. Matthews*, (Fitz. 130,) it was taken for granted, that in a plea of usury, it should appear by the pleadings that the transaction was subsequent to the statute of usury. Chitty, in his treatise on criminal law, in giving the requisites of an indictment, says, "Where the time for the prosecution is

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minor or general sessions, viz. 1 Chit. Cr. Law, 373, 386, 389; and 4 Chit. Cr. L. 351, &c. for some of certiorari and return by one of the justices; with 1 Baynd. 308, note (2). After the conviction is removed, and the point of law decided, the court may go on and give sentence, or if they are not fully informed, they may direct a proceudo to the court below. (*Regina v. Potter*, 1 Salk. 149. 2 Ld. Ray. 937, S. C. by title of *Regina v. Potter et alibi*. 6 Mod. 177, S. C. by the title of *The Queen v. Bethell*. Holt's Rep. S. C. by the title of *The Queen v. Bethell*.) On the court below may suspend judgment, and ask the advice of the supreme court, who will give it; and then the court below can proceed accordingly, without the form of a certiorari, &c. (*Ex parte Barker*, 7 Cowen, 143.) The district attorney may remove the indictment by certiorari as a matter of right. (*People v. Vermylen* 7 Cowen, 140, 141.)

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limited, as under 7 W. 3, ch. 3, which provides that no prosecution shall be had for certain treasons therein mentioned, unless the bill of indictment be found within three years after the crime was committed, the time, as averred in the indictment, should appear to be within the limit." and he cites the authority in support of this position. (1 Chit. Cr. Law, 223, and note (r.)

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E. Cowen, contra. The general rule is, that the day when an offence is charged to have been committed is wholly immaterial. The rule applies as well to indictments as to declarations. This is admitted by Mr Chitty, the writer mainly relied on to sustain the present motion in arrest. He shows at large that a day must be stated in the indictment; but that may be entirely disregarded in evidence, and he cites authorities fully establishing this as a general rule. (1 *Chit. Cr. Law, 217 to 227.) In general you are confined neither to the day nor the year. (*id.* 224.) Indeed, it will be seen by examining the pages of that author to which I have referred, that the rules as to allegation and proof of time are in all respects the same, both in declarations and indictments. Now it is abundantly settled as to civil actions, that though the time be laid in the declaration so as to show the action barred by the statute, this cannot be taken advantage of by error, motion in arrest, or demurrer. And the reason assigned in several of the cases is, that the statute of limitations contains exceptions in favor of infants, prisoners, persons abroad, &c. The defendant must plead the statute, therefore, in order that the plaintiff may reply, and excuse, if he can, the lateness of his action. (Ball. on Lim. 209 to 316, and the cases there cited.)

The passage cited from 1 Chitty, 223, is a mere *dictum* of the writer. No case is given by him for tying down the indictment to a day within the three years, even where it is for treason under the statute of William. Neither of the authorities referred to as supporting his general position, relate to that statute; and it has been repeatedly held that the day laid for overt acts of treason is entirely

immaterial, since, as well as before that act. (Colledge's case, 3 St. Tr. 393, 4. (e) Townley's case, 9 St. Tr. 550, 551; and Ld. Balmerino's case, in a note to the last page. The two last cases also are in Forst. Rep. 7, 9.) In the two last cases it was held that you need not follow the day in the indictment as to "the overt acts, where the proceeding is under the statute of William. In the first of the two cases, the point was holden too clear for debate; and in the last the 12 judges conferred, and were unanimous that the day was immaterial, provided the treason was proved to have been committed before the finding of the bill."

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But admitting the *dictum* of Chitty to give the true doctrine on the statute of 7 William 3, c. 3, s. 5, 6, it does not apply to our statute of limitation of crimes, (sess. 24, ch. 183, s. 7, 1 R. L. 187.) The statute of William is without exceptions, that in all cases indictments of certain treasons must be found within three years. Our statute limits indictment to that time; but this excepts non-residents, and those not usually resident within this state; and even if the day be material, the court will intend after verdict, and on motion in arrest, that the defendants were shown at the trial to be within the exception. (*Murdock v. Herndon's executors*, 4 Hen. & Munf. 200, 203.)

But it cannot be necessary to resort to any such intendment. The day being immaterial, it is sufficient to intend that a time within the three years was proved at the trial, (and this was the fact,) and to reject the day as wholly

(e) This was a case in 1681, of high treason, before the statute of William: "Colledge. My Lord, I think Turberville and Douglass swear as to the 10th of March in Oxon. I desire it may be proved I was in Oxford the 10th of March. Mr. Just. Jones. You yourself came down the middle of March. Ld. C. J. I do remember that they said the 10th of March. Colledge. Did not the indictment say so? Mr. Atty. Gen. It is only in the indictment. Ld. C. J. As to the time mentioned in the indictment, it is not material. That is the constant rule in trials upon indictments; as if a horse be laid to be stole the 10th, if it be proved the prisoner stole it another day, it will be sufficient. The time is not material. The question is, whether the indictment be true in substance. Mr. Colledge, my brothers will tell you the law is so. Mr. Just. Levinz. Though it is laid the 10th of March, yet if it be proved the 1st or 20th, before or after, it is all one. So the thing be proved, they are not bound to a day."

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immaterial ; and so in the case of *Lee v. Clarke*, (2 East, 333.) That was an action for the penalty on the game laws, where it was necessary to prove the offence to have been committed within six *lunar* months of the time when the action was brought. The declaration laid the offence as within six *calendar* months of that time, to wit, on the 21st of January, 1801. Upon this ground, among others, the defendant brought error. Lord Ellenborough put it upon the evidence. He said if the proof had not brought the offence within the six *lunar* months, the plaintiff must have been nonsuited. Lawrence, J. said the time having elapsed, would have been evidence for the defendant. (id. 336.) Lord Ellenborough finally said the time was immaterial ; and the court could not presume that the fact was not proved to have happened within the time prescribed by law. (id. 338.) It is said in Lofft's edition of Gilbert's Ev. 870, 871, that " if a felony is *alleged at such a day, and found to be done, it doth not follow that it was done at the day ; for whether it were or not, the verdict and determination of law ought to be perfectly the same ; so that the time when the felony was done is not determined and adjusted ; nor as to that the record is conclusive."

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Curia, per SPENCER, Ch. J. We incline to think that the day laid in the indictment must be regarded as wholly immaterial for all purposes ; that it is to be intended that the offence proved at the trial was within the three years ; and that for this reason the motion must be denied. The only authority opposed to this view of the case, is what Mr. Chitty says, in his treatise on criminal law in regard to indictments for treason under the statute of 7 William 3, ch. 3. Without questioning this, we are satisfied it cannot apply to our statute limiting the time within which criminal prosecutions are to be commenced. As remarked by the counsel for the people, the statute of William is absolute and without exception. No indictment can be found after the three years against any offender. Whereas, if an offender be not usually resident in this state, our statute does not run in his favor. *Non constat*, on this motion,

but that, on its appearing in evidence that the crime was perpetrated more than three years previous to the indictment being found, and on this being objected, as it might be on not guilty, the prosecution then answered, by proving that the prisoners were within the exception.

The motion in arrest must be denied.

The prisoners were sentenced to hard labor in the state prison for the term of 14 years.

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*JACKSON, *ex dem.* ROBERTS *against* IVES. (a)

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EJECTMENT tried March 32d, 1826, at the Madison circuit, before WILLIAMS, circuit judge.

Verdict for the plaintiff subject to the opinion of the supreme court, on a case which is sufficiently stated in that opinion.

N. P. Randall, for the plaintiff.

C. Stebbins, for the defendant.

Curia, per WOODWORTH, J. This action was commenced to recover part of lot No. 5, in the 4th allotment of New Peterborough.

The plaintiff claimed under a deed from Peter Smith, the patentee, dated the 31st of May, 1819, which conveyed all that part of the south division of lot No. 5, not included in the mill lot.

In order to locate lot No. 5, the plaintiff gave in evidence a deed from Smith to Charles Hill, for the mill lot, dated April 6th, 1812. It is described as being part of lots 22 and 29 of the 3d allotment and 4 and 5 of the 4th allotment ;

Artificial monuments or boundaries shall control distances in the description of parcels in a deed. [1]

The plaintiff in ejectment must, at the trial, prove the defendant in possession of the premises in question, or he cannot recover.

[1] *Seaman v. Hogeboom*, 3 Barb. S. C. 215. *Wendell v. The People*, 8 Wen. 183. *Jackson v. Moor*, 6 Cow. 705.

(a) This case was decided in February term, 1827.

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beginning at a stake in the west line of lot 22, at the distance of one chain from the southwest corner thereof; and runs from thence south 87 deg. east, 9 chains and 50 links; then south 3 deg. west, 31 chains, 62½ links; then north 87 deg. west, 31 chains, 62½ links; thence north 3 deg. east, 31 chains, 62½ links, to an elm sapling; then south 87 deg. east, 22 chains, 12½ links to the place of beginning. Lot No. 5 is bounded thus: beginning at a hemlock tree on the north-east corner of the lot; thence north 87 deg. west, 40 chains to the northwest corner; then south 3 deg. west, 42 chains 50 links, to the southwest corner, then south 87 deg. east, 17 chains, 68 links to the mill lot; then north 3 deg. east, one chain 67 links, to the northwest corner of the mill lot; then south 87 deg. east, 22 chains, 12 links, to a stake standing in the east line of the lot, and in the north line of the mill lot; thence north 3 deg. east, 41 chains, 32 links, to the place of beginning.

If the mill lot is to be confined to the number of chains, it is evident that the north line is a line running parallel with the south lines of lots No. 5 and 22, and at the distance of one chain north of those lines. It is manifest, however, from the case, that the place of beginning of the mill lot, viz. the stake in the west line of lot 22, instead of being one chain from the southwest corner of 22, is distant about one chain 67 links. This appears from the testimony of Cushing, a surveyor, who proved the south lines of 5 and 22 corresponding with a line of marked trees. He also established the southwest corner of 22, where a hemlock tree formerly stood as the original corner. He saw it in 1814, and the marks on it. From that corner he ran a line north one chain; and then turning parallel to the south lines of 5 and 22, the defendant was in possession of a piece of land 40 links wide, and 6 chains and 20 links north of the parallel line last mentioned. He farther testified that he surveyed the defendant's lot about 12 years ago, at which time the line of marked trees, as the north line of the mill lot, was plain to be seen. He surveyed the defendant's lot up to the line of marked trees. He is not in possession farther north. The witness always supposed the line of marked

trees was the north line of the mill lot, *as originally surveyed*, and marked at the time of such survey. The plaintiff, a few years since, erected a hedge fence on the line of marked trees.

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It appears, then, that the lot was located according to the line actually run; but not conformably to the line as designated by length of chain. That line would have been farther south. The plaintiff seems to have acquiesced in the line of marked trees for a number of years, and now seeks to disturb it. Whether he can change this location, although incorrect, need not be considered until it is ascertained that lot No. 5 includes the premises in question. The mistake in the description has happened either by inaccurate measurement, or in putting down in the field book the distance of the place of beginning of the mill lot from the southwest corner of No. 22. It should have been 1 chain and 67 links, or thereabouts, instead of one chain. I have no doubt it was so intended originally.

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Do the bounds of No. 5 include the premises in question? From the boundaries of No. 5, it appears that the north west corner of the mill lot, is 1 chain 67 links north of the south line of No. 5. The next course from this corner, is south 87 deg. east, 22 chains and 12 links, *to a stake standing in the east line of the lot, and in the north line of the mill lot.* This course gives a line running east parallel with the south lines of Nos. 5 and 22, and of necessity makes the stake in the east line of No. 5, at the distance of 1 chain 67 links north of the south lines of 5 and 22, and the same distance from the southwest corner of 22. This south line of No. 5, so run, corresponds with the line of marked trees, spoken of by Cushing, the surveyor; and terminates at the stake where the mill lot was intended to begin.

. Without, therefore, deciding whether the mill lot shall be confined to the number of chains, or whether the practical location made according to the actual survey, and acquiesced in by all parties for a number of years, can now be set aside, it is enough for the defendant, that the premises

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The defendant is entitled to judgment.

Judgment for the defendant.

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 LYON. (a)

The act of the
 6th of April,
 1790, (sess. 13
 ch. 59,) rela-
 tive to the
 military boun-
 ty lands, sec-
 tion 5, 2.
 Grienlief, 333,
 334,) did not
 validate a pat-
 ent to a soldier
 who was not
 alive on the
 27th day of
 March, 1783 ;

so that nothing could pass by such a grant. (19 John. 198, S. P.)

By the act of the third of April, 1807, (sess. 30, ch. 114, 5 W. L. N. Y. 124,) which vests the land patented to John McCloughry, a deceased soldier, in his heirs though aliens, in like manner as it would have descended to them, if they had been citizens of this state at the time of his death, (1781). According to the law of descents of this state, it was intended that the heirs should take according to the law of descents at the time of passing the act. (19 John. 198, S. P.)

The title of J. M.'s heirs, therefore, as it respects any limitation, is to be deemed to have accrued from the time of passing the act. (19 John. 198, S. P.)

But the act of April 5th, 1803, (sess. 26th, ch. 88, 3 W. L. N. Y. 399, s. 1,) vested military bounty lands therefore granted, in the officer or soldier, as at the time of his death, whenever that happened ; thus constituting him a stock of descent, and passing the land to his heirs *ex parte paterna*, and for default of them, then *ex parte materna* ; and the legislature could not, by the act of 1807, divest the title of the latter heirs.

The state has no power to divest the title vested in one set of heirs, and pass it to another ; *e. g.* from the heirs *ex parte materna* to those who, but for their alienism, would have been heirs *ex parte paterna*.

In ejectment, the plaintiff claimed title under the alien heirs of a deceased soldier, such heirs being declared capable of taking by a statute of 1807 ; but which statute was void because the title had, in 1781, on the death of the soldier, vested in his heir *ex parte materna*. The defendant, who claimed title under a deed from one of the alien heirs, showed the outstanding title, but did not connect himself with it ; nor did he show that the heir *ex parte materna* had ever entered or claimed the land, from 1803, when his title accrued, to 1822. Held no defence ; and that the plaintiff should recover the rights of those alien heirs who had not conveyed ; on the ground that the outstanding title was not shown to be a subsisting one ; and a conveyance from the heir *ex parte materna* might be presumed.

(a) This case was decided in May term, 1824.

which the premises in question are a part ; that the patentee was born in Ireland, and came to this country in the year 1775 ; and was a lieutenant in the army of the United States in the revolutionary war, and died at the capture of Cornwallis, without issue ; that he had, when he died, five brothers, to wit, Alexander, Patrick, Thomas, Gilbert and William, and a sister of the name of Margaret, who were born in order they are named ; that Alexander and Thomas died without issue more than thirty years since. Patrick died many years since, leaving issue, Alexander, Thomas, William, Patrick and Jane. Alexander, the eldest son of Patrick, died on his passage to this country, about twenty-one years ago next September. He was coming to this country to claim the land granted to Lieutenant McCloughry. He (Alexander) left Thomas McCloughry, junior, his eldest son and children John, Elizabeth and Jane. Elizabeth is married to James Mills, and Jane to William Cook. The lessors of the plaintiff are William and Margaret, brother and sister of the lieutenant, Thomas, William, Patrick and Jane, the surviving children of Patrick, brother to the lieutenant, and Thomas McCloughry, junior, John, James Mills and Elizabeth his wife, and William Cook and Jane his wife, the children of Alexander, the son of Patrick, of whom Thomas is the eldest. That the lieutenant, if alive now, would be about 74 years old, he being the youngest in the family except William and Margaret. That William, the brother of the lieutenant, is still living, and Margaret, his sister, died without issue about one and a half years since. It was admitted that all these persons were born in Ireland, and were and are British subjects ; and that Gilbert McCloughry, the brother of the lieutenant, came to this country about the year 1795, and is named in the act of the legislature, entitled " An act to enable certain persons therein named to purchase and hold real estates within this state, passed April 3d, 1797." That in the year 1796 he came on to the lot, claiming it as sole heir to the lieutenant, and built a log house, and made a small clearing thereon ; and on the 24th day of February, 1797, for the

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consideration of \$1000, conveyed by warranty deed the whole of the lot 10, excepting one hundred acres before conveyed to Michael Dow, to Daniel Avery, who, or *bona fide* purchasers under him, have ever since possessed the lot, and made valuable improvements. It is admitted that the defendant holds as a *bona fide* purchaser under Avery. It was also admitted that Thomas McCloughry, junior, one of the lessors of the plaintiff, for himself and for the other lessors of the plaintiff, before the commencement of this action, demanded possession of the premises in question, and offered to pay for the improvements thereon, or submit the improvements to appraisement, *which was refused by the defendant. It was further admitted, that in the year 1805, Thomas McCloughry, junior, one of the lessors of the plaintiff, came to this country to claim the land in question. That he applied to the legislature in 1807, and procured the passage of an act, entitled "An act relative to land granted to John McCloughry," passed 2d of April, 1807.

Alexander Ross, a witness on the part of the plaintiff, testified that he knew Gilbert McCloughry, a brother of John the lieutenant, in Ireland; that he, the witness, removed to this country in 1774, and is now 73 years of age; that Gilbert was a man when he was a boy; thinks he was 15 or 16 years older than the witness; that he has heard of him in this country, but never saw him here. That more than twenty years ago he heard Gilbert McCloughry had removed to Canada; but he does not know when he went, nor how long he had been gone before he heard this report. That he has never heard whether he was dead or alive. Levi Beardsley, another witness for the plaintiff, testified that he had made inquiries about Gilbert McCloughry, and learned that he had lived at or near Herkimer; that he left there in 1798 or 1799; and that he had been unable to trace him beyond that time and place. It was further admitted, that the mother of lieutenant John McCloughry, and the wife of William Barber, were sisters by the name of Adams; the patentee's father having married Jane Adams, and William Barber having married her

sister Margaret Adams. That William Barber and his wife were both born and both died in Ireland, long before the declaration of independence of the United States, leaving at their decease only one child, a son by the name of Patrick, who came to America with his wife more than sixty years ago, and settled in Orange county in this state, where he died in September, 1797; and that he left surviving him four children, his heirs at law, to wit, Margaret, Francis, John and Joseph, all of whom were born in Orange county, in the order they are named. That Margaret married John Davidson, a citizen of the United States, by whom she had six children, to wit, David, Jane, Margaret, Catharine, Alexander and Elizabeth, all of whom were born in the United States, and are living, except Catharine, who is dead, and who died without issue, and whose mother, Margaret, is also dead. That Francis, the eldest son of Patrick Barber, was killed in battle in the revolutionary war, having been married, and leaving at his death two children, to wit, George and Francis, his heirs at law, both of whom are living, and citizens of the United States. That John and Joseph, the other two sons of Patrick Barber, are still living, and reside in the United States. And it was also admitted that all the relatives of the patentee on the part of his father, were and are citizens and subjects of Great Britain, and aliens to the United States. It is not known that any of the above descendants of Patrick Barber have ever claimed the premises in question. It is agreed that the admissions made in this case are and shall be subject to all and every exception that might have been made or taken on the trial; and that all objections to the evidence and facts admitted, shall be and are hereby reserved. That all public and private acts of the legislature may be read and used on the argument.

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A. Contin, for the plaintiff.

D. Cady, contra.

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McCloughry and others, v. Skeels, (19 John. 198,) which was a case upon this same title, it was decided, 1. That nothing passed by the patent to John McCloughry, the soldier, granted the 13th of September, 1790, for the lot in question; he having died in 1781, and the act of April 6th, 1790, relative to military bounty lands, not authorising a grant to a soldier who was not alive in March, 1783: 2. That the act of April 3d, 1807, (5 W. Laws N. Y. 124,) vests the lands patented to John McCloughry, in his heirs though aliens, in the same manner as it would have descended to them if they had been citizens of this state; but by the true construction of that act, they are to take according to the law of descents in this state at the time of its passage: 3. That the title of the heirs, "as it respects the statute of limitations, is to be deemed to have accrued from the time of passing the act."

The evidence as to the death of Gilbert McCloughry is essentially the same as it was in the other cause; where it was held to be too slight to raise the presumption of his death before the passing of the act of April 3d, 1807. One witness swears, that about twenty years before the trial he heard that he had removed to Canada; and he had not heard of him since; another witness swore that he had made inquiries concerning him, not in Canada, but in Herkimer and Montgomery counties, where he lived in 1798 or 99, and could not trace him beyond that period. There is not sufficient evidence of his death. He must be considered, then, as in being in 1807, when the act was passed vesting the title to this lot in the heirs of the patentees, and as having taken the one fourth to which he was entitled. And the defendant having deduced a regular title from him, the plaintiffs cannot in any event recover more than three fourths of the premises in question.

But it is contended on the part of the defendant in this case, that the lands in question never did escheat, and that the act of April 3d, 1807, vesting the title to them in the *alien* heirs of the patentee was void and inoperative. It appears from the case, that in 1781, when the patentee died, he had a maternal cousin, by the name of Patrick

Barber, a citizen and inhabitant of this state; that Barber came to this country more than sixty years before the trial, and settled in Orange county, where he died in 1791, leaving several children, some of whom are still living, and are citizens of the United States.

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It is contended, that, on the death of the patentee in 1781, all his heirs, *ex parte paterna*, being aliens and incapable of taking the estate, it descended to Patrick Barber, his cousin and heir on the part of his mother.

If no title passed to the soldier by the patent of September 13th, 1790, as is said by the court in the case of 19 John. then admitting that Patrick Barber would have inherited, if there had been any inheritance for him to take, he can have no claim to these premises, because no title was vested in his ancestor. But it was immaterial in that case whether any title vested in the soldier or not by virtue of the patent; for if a title did pass, still, dying without heirs capable of taking by descent, as he appeared to have done, in that case the land of course escheated to the state. If nothing passed, then the title was never out of the state; and upon either supposition, the state had a right to make such disposition of the land as was made by the act of April 3d, 1807. But the act of April 5th, 1803, (3 W. Laws N. Y. 399,) provides for the case of officers and soldiers who died previous to the 27th of March, 1783, as follows: "That the title to all lands heretofore granted by letters patent to officers and soldiers serving in the line of this state, in the army of the United States, in the late war with Great Britain, and who died previous to the 27th day of March, 1783, shall be and hereby is declared to have been vested in the said persons at the time of their deaths respectively;" and in *Jackson ex dem. Sherwood v. Phelps*, (3 Caines, 67,) it seems to have been the opinion of the court, that this was in the nature of a declaratory act; and that it was the intention of the legislature that the title thus declared to exist, should relate back to the time of issuing the patent; (b) though Ch. J. Kent was of a different opinion.

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(4) *Jackson v. Winslow*, (2 John. 80), and *Jackson v. How*. (14 John. 405 S. P.)

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IF, then, in 1781, when the patentee died, he left heirs in this county capable of taking, the title to these lots vested in them, (3 John. 1, 7 John. 214,) and nothing passed by the act of 1807. The legislature intended to give land belonging to the state; but if these lots had not escheated, they did not belong to the state; and the legislature had no right to divest the vested rights of the heirs of the patentee. (Jackson, *ex dem.* Folliard, v. Wright, 4 John. 75.)

The 8th section of the act of April 5th, 1803, provides the rules of descent established by the act abolishing entails, &c., shall apply and govern in the cases mentioned in the first section of the act, &c.

But admitting that Patrick Barber was the legal heir of the patentee at the time of his death in 1781, and was capable of taking the land in question, no privity is shown between him or his title, and the defendant; nor is there any evidence that his title, whatever it may have been, was a subsisting title at the time of the trial; on the contrary, every presumption in the case is against the fact of its being a *subsisting title*. He never entered upon the land, nor any one claiming under him. A surrender or conveyance from him may therefore be presumed. (3 Wheat. 224, 230, note. 4 John. 202. 7 id. 278. 10 id. 338, 387.)

The plaintiff is, therefore, entitled to recover three-fourths of the premises in question. But the defendant is entitled to compensation for his improvements, under the statute the settlement on the lot having been made under color of a *bona fide* purchase.

Rule accordingly.

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M'LAUGHLIN *against* WAITE and WAITE, (a)

ASSUMPSIT for money had and received; tried at the New York circuit, in January, 1826, before EDWARDS, C. Judge; when, under the charge of the judge, a verdict was taken for the defendant, with leave to the plaintiff to make a case, and with liberty to either party to turn it into a bill of exceptions or special verdict. The facts are fully stated in the opinion of the court.

D. Selden, for the plaintiff, moved for a new trial.

J. Wallis, contra.

Curia per SAVAGE, Ch. J. The defendants were lottery office keepers. They purchased a certain ticket and sold it in shares. One half was found by the plaintiff in the street, who carried it to the defendants, and said he expected a reward for finding it. It was advertised, but no owner appeared. The plaintiff then claimed to be the owner by virtue of the finding; and the ticket having drawn \$5000, demanded payment of one half, which was refused. The judge charged the jury that the plaintiff was not entitled to recover, he having obtained possession by finding. The jury found a verdict for the defendants; and by a stipulation between the parties, the supreme court, if they are of opinion, from the facts, that the plaintiff is entitled to recover, are to direct judgment for the plaintiff for \$2,125, with interest from the 15th of December, 1823; and either party is at liberty to turn the case into a bill of exceptions or special verdict.

That the finder of a chattel, though he does not acquire, by such finding, an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover, are propositions fully established by the case of *Armory v. Delamirie*, (1 Str. 505.) The plaintiff was a

The finder of a chattel has a special property in it, and may maintain trover against any one who shall convert it, except the rightful owner.

But the rule does not apply to the finder of a chose in action, *e. g.* lottery ticket.

Where M. found one half of a lottery ticket, and gave it to W. and W. with directions to advertise it, which they did, but no owner came

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for it, and the ticket finally drew \$5000, which W. and W. received; *held*, that they were not accountable to M., the finder, for one half of the prize money.

(a) This case was decided in October term, 1827.

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chimney sweeper's boy, and found a jewel, which he carried to the defendant, a jeweller. The stones were taken out by the defendant's apprentice; and it was held that the plaintiff was lawfully in possession against all the world except the owner, and might maintain trover. The same doctrine has often been recognized. (3 Salk. 365. 1 Taunt. 309.) It is not controverted, but expressly admitted by the defendant's counsel. It is denied, however, that that doctrine is applicable in this case. The plaintiff here found, not a chattel, but a chose in action; and it is contended that the law relative to choses in action is to be the law of this case. The ticket is supposed to resemble a promissory note payable to bearer; and it is settled that the bearer of such a note which is lost, must show a valuable consideration. (Hinton's case, 2 Show. 235. Grant v. Vaughan, 3 Burr. 1523.) And the bearer having come to the possession of such a lost note, or a lost bank note, in the due course of business, may maintain trover against any person who withholds it, even against the owner who lost it; though the finder could not, but would be answerable to the loser. (Miller v. Race, 1 Burr. 452.) In this court, the rule is that "the bearer of a note or bill payable to bearer, need not prove a consideration unless he possesses it under suspicious circumstances." * (7 Cowen 176.) Any person in possession of a note endorsed in blank, or payable to bearer, may sue upon it, and *prima facie*, he is the owner; but if it appear to the court that he is not the true owner, then he must show that he gave value for it, or received it in the ordinary course of business.

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In the case of Ford v. Hopkins, (1 Salk. 283,) Lord Holt is made to say that bank notes, exchequer notes, or lottery tickets are similar; and the right to bring trover for them by the owner, against any person into whose hands they may come, is governed by the same rules. Lord Mansfield supposes this to be a mistake of what was said by Lord Holt, as bank notes are similar to cash, and whoever receives them fairly for a valuable consideration, is entitled to retain them. If this doctrine proves any thing in the principal case, it shows that the loser of the ticket may maintain an

action against the plaintiff, or any person to whom he might pass it ; though no such action could be sustained against the person taking a negotiable note, payable to bearer, if taken in the fair course of trade. In that particular, then, there is a difference between a note payable to bearer and a lottery ticket.

It is for the convenience of trade that notes payable to bearer pass by delivery, and that actions may be brought upon them by the *bona fide* bearer. But if the holder of such a note, or even a bank note under suspicious circumstances, cannot recover without showing a consideration, it follows that a finder cannot maintain such action. And if the finder of a bank bill, or note payable to bearer, cannot, as such, recover upon it, because he has no title to it, upon what principle of law or public policy shall the finder of a lottery ticket stand in a better situation ?

It is said that the owner's remedy is gone as against the defendants, but would be perfect against the plaintiff. The equities of the parties to a gaming contract, though sanctioned by law, are not entitled to much consideration. But if they were, it is indifferent to the court and to equity whether the plaintiff or the defendants have the money. The plaintiff has paid nothing for it ; nor have the defendants ; for though they paid for the ticket, yet they were reimbursed by the sale of the shares of the same ticket. It is therefore a question of strict right between the parties. The ticket is payable to the holder. " This ticket will entitle the holder to one half share of such prize as shall be drawn to its number," &c. Now, although bank notes and lottery tickets are not alike, yet there may be some analogy ; for instance, in ascertaining who is properly called the *holder*. There can be no doubt that a payment of this ticket to the plaintiff, had he not disclosed the fact of finding, would have been a defence to any action which the owner might bring against the defendants ; but if they had paid it to the plaintiff with full knowledge that he found it, and of course was not the true owner, would they not be compelled to pay again to the true owner, if he had demanded it in season ? Under such circumstances, the

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maker of a note would be compelled to pay a second time, and I cannot see the difference in principle. In case of the note, the instrument is negotiable and passes by delivery; more than that cannot truly be said of a lottery ticket. In case of the note, the maker would be compelled to pay the owner, because he had paid with notice one who was not the owner. The same reason would apply in the case of the ticket. If the possession, by finding, of a note payable to bearer does not, *per se*, make the possessor the bearer in law, can a similar possession of the share in question, *per se*, constitute the possessor, without consideration, the holder within the legal construction of the contract?

The case of the jewel found by the boy is not in point. There the plaintiff had actual possession of the chattel, the property itself. Here the plaintiff has had no such possession. He had possession of a contract to which confessedly he is not and never was a party, unless the bare fact of finding makes him such party. It seems to me, in the absence of express authority, that all legal analogies are against the doctrine. Here is a sum of money in the hands of the defendants, *to which neither party is equitably or legally entitled. The maxim *melior est conditio possessoris* seems to be applicable.

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The motion for a new trial must be denied. [1]

New trial granted.

WOODWORTH, J.

CLARKE against DUTCHER. (a)

An acknowledgment of a debt, in order to take it out of the statute of limitations,

On error from the court of common pleas of Otsego county. Dutcher sued Clarke on the 8th of January, 1821.

[1] Affirmed on error. See S. C. 5 Wen. 404.

must clearly refer to the very debt in question between the parties.

Where there is no dispute what the facts are, which are insisted on as taking a debt out of the statute of limitations, their effect is a question of law. Otherwise where the facts are doubtful upon the evidence. The question is then one mixed of law and fact.

✓ A lessor had, for a great number of years, received of his tenant annually a few shillings

(a) This cause was decided in August term, 1824.

by summons, in a justice's court of that county; and declared that he, Dutcher, then was, and had been from the spring of 1785, in the possession and occupation of lot No. 36, containing 100 acres, in the Cherry Valley patent, as a tenant to Clarke, at an annual rent of 6d. sterling an acre, or £2 10, sterling for the whole lot; that the defendant Clarke, from that time to the present had demanded, and the plaintiff Dutcher had been obliged to pay, and had paid £4 14s. York currency per year for the annual rent to the defendant, being about 64 cents more than the actual rent reserved on the lots; and that when the plaintiff took possession, there was *rent due on the lot from 1741, which the plaintiff had been obliged to pay, and had paid at the same rate; and which was more than the annual rent reserved on the lot. The *second* count stated the same facts, and added that the plaintiff paid the money in ignorance of his own rights. The *third* count was for the interest paid by the plaintiff at different times on the rent. The *fourth* count was for compound interest paid on the same rent. The *fifth* and last count was for money lent, money paid, &c. and money had and received generally. Pleas, the general issue, also the statute of limitations to all the plaintiff's demand, except for the last six years; also the statute of limitations to the whole demand; also a set off for rent due on the same lot.

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On the trial, (January 18th, 1821,) the plaintiff gave in evidence a lease in fee of lot 36, dated March 10th, 1755,

more rent than was due; and his tenant at length sued him before a justice for the excess he had paid, some having been paid more, and some less than 6 years before suit brought. The lessor asked the tenant, before declaration put in, why he had sued him? who told him he had sued him for the excess of 4 or 5 shillings per year; and the lessor replied, "It has been an old custom of mine to take so much." The tenant asked him if custom made law? He said he did not know that it did in this case. *Held*, that this did not amount to such an admission as would take the claim out of the statute of limitations.

A charge or opinion of a court which is entirely abstract, or out of the case, so as not to affect it, though erroneous, cannot be insisted on as erroneous by exception. But the court of error will look through the case, and if they find that it might have been affected by the charge or opinion, injuriously to the plaintiff in error, the judgment will be reversed.

Where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of the law, and it shall be considered a voluntary payment.

Thus, where a tenant paid rent to his landlord, at the rate of £4 14s. currency for £2 10s. sterling, the rent being reserved in sterling money, *held*, that he could not recover back the excess.

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from the defendant's ancestor George Clarke, the colonial lieutenant governor of N. Y., to one Ramsay, reserving the annual rent of £2 10s. sterling, and receipts for the following sums, at the following dates, as paid by the plaintiff to the defendant: July 26th, 1797, £31 1s. 5½d. in full of arrears to the 29th September, 1796. On the receipt for this sum was endorsed a statement of rent due from June 15th 1767, to July 26th, 1797, (deducting 8 years for the war,) at £148 1s. Other receipts were dated February 3d, 1791, for £4 14s. April 23d, 1794, for £20. October 29th, 1796, for £16 14s. November 10th, 1796, for £20. (These receipts were all included in a settlement between the parties, July 26th, 1797.) March 21st, 1798, for £4 14s. June 22d, 1804, for \$20, and the plaintiff's bond for \$65 10 for six years' rent, and interest on same. July 16th, 1814, for £32 18s. in full for rent in Sept. 29th, 1813, inclusive; and £9 2s. 5d. in full of interest, and \$10 costs. June 14th, 1815, for £4 14s. rent, and 4s. 8d. interest. October 1st, 1817, for \$24 87 in full for rent for 2 years. January 31st, 1820, for £9 8s. rent, and 11s. interest. January 8th, 1821, for £4 14s. It was admitted that on Monday before the trial, the plaintiff sent \$16 for rent to the defendant, which he refused to receive, saying he would set it off on the trial. Judgment for the plaintiff of \$50, with costs; whence the defendant appealed to the common pleas.

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*The cause was tried in the C. P. in June, 1821. On the trial, the plaintiff proved the lease in evidence before the justice, and that he had been in possession of the lot 36 for about 30 years claiming under it. The plaintiff then proved the receipts above set forth, as in evidence before the justice, and a witness for the plaintiff testified, that allowing all the rent to have been regularly paid by the plaintiff since the 29th of September, 1796, at £4 14s. currency per annum, he would have overpaid \$65 48, allowing all the rent to have been regularly paid by the plaintiff from the 29th of September, 1796, at £4 14s. currency per annum.

To meet the plea of the statute of limitations, the plaintiff called his son Joseph Dutcher, who testified that after the commencement of this suit in the justice's court, the

defendant called on the plaintiff, and requested to know why he had sent a summons for him? To which the plaintiff answered he had been informed that he, the defendant, had taken too much rent of him: say 4 or 5 shillings per year; to which the defendant replied, "It has been an old custom of mine to take so much." The plaintiff asked the defendant if custom made law! who said he did not know that it did in this case.

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Another witness for the plaintiff stated that he had cast the rent, and found overpaid to the defendant on the 29th of September, 1796, \$41 56, deducting, as appeared to have been done by the paper showing the settlement at that time, eight years' rent for the war. If the 8 years' war were allowed the defendant, there would be due him at that time \$47 32; but the witness had not allowed any interest on the rent arrear. The defendant's general agent, Mr. Morrell, proved a calculation by himself of all arrears of rent and interest except for 8 years of war, and of payments made to the defendant up to July the 16th, 1814, and made due to the defendant at that time a balance of £16 10s. 11d. He also proved a calculation on the same principles, from the 29th of September, 1814, inclusive, to the 8th of January, 1821, the time of the last payment; and made the balance £4 8s. 8d. Adding the £16 10s. 11d. made £25 9s. 11d.—\$74 82 then due the defendant. He stated that he had refused a tender *of 16 dollars as a balance of rent due the defendant, made by the plaintiff on the 16th of January, 1821, after the suit commenced before the justice. In answer to a question put by the plaintiff's counsel, he said the reason the defendant assigned for claiming £4 14s. currency for £2 10s. sterling reserved by the lease was, that after the war, the rate of exchange being against this country, his tenants had agreed to pay that sum in consideration that he would deduct 8 years' rent for the war. That he did not exact or demand it; but if the tenants declined paying it, he took the £4 8s. 11d. The witness further stated, that in making up the balances, as he had sworn to them, he cast the interest on the rent of each year separately, to the time of the pay

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ment; and if the payment at that time equalled or exceeded the interest then due, he added the interest to the principal, and deducted the payment; but if the payment did not equal the interest, he cast the interest on the rents to the time when the sum of the payments equalled or exceeded the interest then due, then added the interest to the principal and deducted the payments and the interest on the payments from the principal and interest. The testimony of Mr. Morrell, explaining one of the receipts, will be found stated in the opinion of the court.

The court below decided, and so charged the jury, that the tender of the \$16 was not conclusive that so much rent was due to the defendant. That the excess of payments were not to be deemed made in ignorance of the law, but of the facts; the rent being reserved in sterling money, but estimated and paid in currency; and that the action, therefore, would lie for the excess, unless barred by the statute of limitations; that the receipts of July 26th, 1797, and of July 14th, 1814, were evidence that settlements were then made, and that the parties could not go back beyond either of those periods, unless the testimony of Joseph Dutcher should be deemed sufficient to take the case out of the statute of limitations; that this was a question of fact for the jury. If they thought there was evidence of an admission of indebtedness by Clark, on a new promise by him, they might go through the whole accounts; otherwise not; that the matters in evidence on the part of the defendant were not a conclusive bar of the plaintiff's action. To all these several decisions the defendant excepted. The jury found a verdict for the plaintiff with \$50 damages, upon which the C. P. rendered judgment with costs; and the defendant brought error to this court.

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G. Morrell, for the plaintiff in error.

I. Seelye, for the defendant in error.

Curia, per SUTHERLAND, J. The demand of the plaintiff

below must be limited to the six years preceding the commencement of his suit. The admission by Clarke that it had been an old custom of his to take four or five shillings more rent than was reserved in the lease, is not sufficient to open all the antecedent accounts between the parties. The conversation commenced by Clarke's asking Dutcher why he had issued a summons against him? From which it may be inferred that it was soon after the issuing of the summons, and before the declaration was put in before the justice. He could not then have known that Dutcher sought to recover back any payment made prior to the last six years. It ought clearly to appear in all such cases, that the acknowledgment related to the identical debt or demand which is sought to be recovered upon the strength of it.[1] (*Sands v. Gelston*, 15 John. Rep. 511.)

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[1] In New York in 1849 it was enacted, that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the statute of limitations, unless the same be contained in some writing signed by the party to be charged thereby; but this enactment does not alter the effect of any payment of principal or interest, § 110 N. Y. Code. In *Wadsworth v. Thomas*, 7 Barb. 445, it was held that a promise, made since the Code took effect, to pay a debt based by the statute of limitations, before the Code went into operation, will not revive the cause of action, unless such promise be in writing, subscribed by the promisor, and it was held that this interpretation of this section of the Code did not give to it a retrospective effect, so as to take away any vested right of the creditor. It would have been otherwise, had the promise been made before the Code went into effect.

Previous to this section of the New York Code, a debt might be taken out of the statute of limitations, by an express verbal promise to pay the same, or by a clear recognition of the present existence of the demand. *Stafford v. Richardson*, 15 Wen. 396. *Allen v. Webster*, *id.* 288. See also, *Van Keeren v. Parmelee*, 2 Comst. 513. *Bell v. Morrison*, 1 Peters 362. *Roosevelt v. Mark*, 6 John. Ch. R. 290. *Tompkins v. Brown*, 1 Denio 247. *Sands v. Gelston*, 15 John. 511. *Cocks v. Weeks*, 7 Hill 46. *Watkins v. Stephens*, 4 Barb. S. C. R. 170. *Stafford v. Bryant*, 2 Page 45. *Murray v. Coster*, 20 John. 570. See also *Wetzell v. Bussard*, 11 Wheat. 310. *Clemenston v. Williams*, 8 Cranch 72.

The same rule was recognised by Mr. Justice Story in *Bell v. Morrison*, 1 Peters 351. In all those cases this principle was laid down, that there must be an unqualified admission that the debt is due, and that the party is willing to pay it. Such an admission however was considered sufficient to raise an implied promise of payment, although no express promise was proved. See *Van Keeren v. Parmelee*, 2 Comst. 529. If the acknowledg-

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This was not a case of open unliquidated mutual accounts. The receipt of July 16th, 1814, settled all accounts between the parties in relation to the rent on lot No. 36, up to September 29th, 1813. If the plaintiff below, upon that settlement, paid by mistake more than he

ment was qualified in a way to repel the presumption of a promise to pay, it was of no avail. *Sands v. Gelston*, 15 John. 520. *Bradly v. Field*, 3 Wen. 273. Nor was an acknowledgment of the original justice of the demand sufficient without recognising the present existence of the debt. See per Mr. Justice Marcy in *Purdy v. Austin*, 3 Wen. 189. *Allen v. Webster*, 15 id. 288. A promise to the holder of a chose in action, sufficient to take the case out of the statute of limitations, was available in an action by a subsequent holder. *Soulden v. Van Rensselaer*, 9 Wen. 223. In *Read v. Williams*, 2 Wash. C. C. R. 5, 14, Mr. Justice Washington charged the jury, that, "Anything tending to negative a promise, must be considered as qualifying every other expression; and that as the whole must be taken together, it amounted to a refusal to pay, which can never be construed into a promise to pay." See farther *Angell on Limitations*, p. 245, § 25.

In England, if a debtor simply acknowledged an old debt, the law implied from that simple acknowledgment a promise to pay. *Phillips v. Phillips*, 3 Hare, 290. 25 English, Ch. B. 300. But now, by 9 Geo. 4, c. 14, s. 1, in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the 21 Jac. 1, c. 16, or the 10 Car. 1, sess. 2, c. 6, (Irish act) or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of said enactments, or either of them, so as to be chargeable in respect, or by reason only, of any written acknowledgment or promise, made and signed by any other or others of them: provided nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person, whatsoever; provided also, that in actions to be commenced against two or more joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of said acts or that act, as one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or other defendants against whom he shall recover, and for the other defendant or other defendants against the plaintiff. See also 9 Geo. 4, ch. 14, sess. 2, § 4. This first enactment is so analogous to § 110 of the New York Code, that I have copied it

ought to have paid, the error might have been corrected any time within six years, and the excess recovered back, provided the mistake was of a character by which the law

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entire. The decisions under it in England, will no doubt help materially in construing § 110 of the N. Y. Code.

Construction of the act.

The first clause of this enactment, it has been held, has a retrospective operation and applies to a parol acknowledgment made before the provisions of the statutes went into effect, although the acknowledgment was made before the passing of the act. *Towler v. Chatterton*, 3 M. & P. 619. 6 Bing. 258. *Ansell v. Ansell*, 3 Carr. & P. 563. *Amner v. Cattle*, 2 M. & P. 367. But see per Rolfe, *Moore v. Durden*, 12 Jur. 138—Exch. And the cause was at issue before that time. *Hilliard v. Lenard*, M. & M. 297. In *Ansell v. Ansell*, the only evidence to take the case out of the statute of limitations, was parol acknowledgment, and it was submitted by the defendant that, since the statute 9 Geo. 4, such an acknowledgment was not sufficient; and for the plaintiff it was insisted, that as the action was commenced before the 1st of January, 1829, when the act came into operation, its provisions did not apply. Lord Chief Justice TENTERDEN, was of opinion that the words of the act had relation to the time of trial.

The statute says the promise "must be signed by the party chargeable thereby." Therefore, an acknowledgment written and signed by another person, at the request of the promisor, is not sufficient. *Hyde v. Johnson*, 3 Scott, 289; 2 Bing. N. C. 776; 2 Hodges, 92. Money deposited with a banker, is money lent, with a superadded obligation, that it is to be paid when called for; and consequently if not noticed for six years it will be affected by the statute of limitations. *Per curiam, dubitante* Pollock, C. B. *Pott v. Cleg*, 16 M. & W. 312; 11 Jur. 289; 16 Law J. Exch. 210.

What a sufficient acknowledgment.

The acknowledgment must amount to a distinct promise to pay, or a distinct acknowledgment that the sum is due. *Bucket v. Church*, 9 Carr. & P. 209. And the construction of the acknowledgment if doubtful is for the court; if it be explained by extrinsic facts, they are for the consideration of the jury. *Morrell v. Frith*, 3 Moo. & W. 402. 8 Car. & P. 246. 1 Horn. & F. 100 2 Jur. 619.

If a defendant, by letter, admit a balance due, without saying the amount, it is sufficient. *Dickenson v. Hatfield*, 5 Carr. & P. 46; 1 M. & Rob. 141. But if the whole evidence be merely proof of the writing and no proof of the original cause of action, the plaintiff can only recover nominal damages. *Id.* "I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money £30 9s. 9d."—*Held* a sufficient acknowledgment of that sum being due. *Dobbs v. Humphries* 10 Bing. 446. 4 M. & Scott, 285. A bankrupt, wrote a letter to B. in which he alluded to a debt of £98, and stated, *inter alia*, as follows:—"By the end of next month I shall have my bankers'

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did not hold him concluded. But having slept upon his rights until the statute of limitations has attached, and having failed to show an acknowledgment on the part of

account here, and I shall remit the sum due to you in a draft on them." *Held* a sufficient promise to answer the statute of limitations and a plea of bankruptcy *Long v. Mackenzie*, 4 Carr. & P. 463. A letter from the defendant to the plaintiff wherein he says:—"I can never be happy until I have not only paid you, but all to whom I owe money," and "your account is quite correct; and oh! that I were going to enclose you the amount of it." *Held* that this was evidence to go to the jury of an acknowledgment of the debt. *Dodson v. Mackey*, 4 Nev. & M. 327. Ad. & E. 225 N. *Quere*. Whether proof of such letters, together with proof of a bill drawn more than six years ago, by the plaintiff on the defendant, and accepted, would entitle the plaintiff to recover nominal damages? *id.* See also *Bird v. Gammon*, 5 Scott, 213. 3 Bing. N. C. 883. 3 Hodges 224.

So, the following letter was held to contain a sufficient acknowledgment—"I do not desire that you, or any other of my creditors should lose what I owe them. As you have mentioned the limitation act, I answer at once, that I am ready to put it out of my power, to take advantage of that act, and will immediately give you my note for whatever amount is due to you. To pay you now, or within a year, I am utterly unable. It is of course indispensable that the exact sum I owe you be fixed, whether you accept my note or not. I have clearly shown you, in a former letter, that your account is not in accordance with the estimate upon which you agreed to do the work. If you cannot produce the estimate, it is certainly reasonable that some (and considerable) deduction should be made. You will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if possible, to borrow it from a friend, which I have the hope of doing, and wipe the account entirely from your books. I am fully sensible and thankful for the forbearance you have shown, but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due you be ascertained." *Gardner v. McMahon*, 6 Jur. 712, Q. B. So also—"As to the sum of £100, which you lent me, whether stock or money I do not know, I always believed it had been paid almost immediately by C. S. as he had money of mine." This acknowledgment, on C. S. negating the fact of payment, was held sufficient to warrant the jury's finding for the plaintiff. *Brown v. Brown*, 2 Jur. 255.

A defendant having a claim against the plaintiff, the latter, at the foot of his bill, acknowledged the debt as follows:—"By Mr. Lacey's bill."—leaving a blank for the amount. He then wrote below, "Agreeably to the request above, I send you my bill, which I will thank you to peruse, correct, and favor me with a bill for the balance." *Held*, sufficient. *Waller v. Lacy*, 1 Scott, N. R. 186; 1 Man. & G. 58; 8 Dowl. P. C. 563; 4 Jur. 435. See *Waugh v. Cope*, 6 Mee. & W. 824. So an absolute promise in writing to pay an amount when ascertained is good; even when coupled with extrin

the defendant sufficient to take the case out of the statute, no inquiry can now be had into any accounts between the parties in relation to the rent, prior to that settlement.

*It was objected upon the argument, that the opinion of the court of common pleas in relation to the statute of limitations was not excepted to. It is true that that part of the bill of exceptions which relates to the statute of limitations, after stating the point raised by the counsel to the court, and their decision upon it, omits the usual conclusion, "to which opinion of the said court, the counsel for the said George did then and there except." But I think we are authorised in considering that omission as matter of accident and mistake, in drawing up or copying the bill of exceptions. The whole matter contained in the bill of exceptions upon that point, would have been irrelevant and impertinent, unless the opinion expressed by the court had in fact been excepted to. We cannot suppose that respect-

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die parol evidence as to the amount. *Chealyn v. Dalby*, 4 You. & C. 238. "I have received the articles, which together with the cash overpaid on the settlement of your account amounts to £80 7s., which sum I will pay in two years."—*Held*, first, that it was evidence of an account stated of debts, which would become due in two years, so as to defeat a plea of the statute of limitations, in an action brought within eight years afterwards. *Wheatly v. Williams*, 1 Moo. & W. 593. Tyr. & G. 1943.

When part payment is sufficient

Where a specific sum of money is due, the mere fact of the payment of a less sum is some evidence of a part payment to take a debt out of the statute, *Burn & Bolton*, 15 Law J. N. S., C. P. 97; but not if these two admitted demands then due, and it is doubtful to which the payment was meant to apply. *id.* per Tindal ch. Words used at the time of making a payment qualify it, but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment. 17 L. J. Exch. 357. Nor will such part payment avail, unless it be made under such circumstances as warrant a jury in inferring a promise to pay the residue. *Wainman v. Kymman*, 1 Exch. B. 118; 16 L. J., Exch. 232. A payment of interest within six years by one of several joint contractors will take the debt out of the statute of limitations as against all. *Wyatt v. Hodson*, 8 Bing. 209; 1 M. & Scott 242. An unsigned written acknowledgment by the defendant, of a payment made by him will avoid the statute of limitations. *Cleave v. Jones*, (in error) 15 Jur. 5, 15. 20 L. J. Exch. 238. So would a simple entry of partial payment in an account-book of the defendant, *id.* *Some* *de* a verbal acknowledgment of part payment would also be sufficient. *id.*

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able counsel would thus unnecessarily incumber the record, or that they would seek to impose upon the court, by appearing to state an exception which was not in fact taken.

Where there is any dispute as to the facts which go to prove the making of a new promise, there, whether a sufficient acknowledgment or promise has been made to take the case out of the statute, is a mixed question of law and fact, to be passed upon by the jury. But when the facts are undisputed, it is for the court to determine whether they take the case out of the statute or not. Here it was not denied that Clarke made the declaration relied upon as evidence of an acknowledgment of the debt. Whether it amounted to a sufficient acknowledgment or not, was an unmixed question of law.

The opinion expressed by the court was erroneous, and properly excepted to.

If the plaintiff's demand is limited to the period subsequent to the settlement of July 16th, 1814, he has no ground for a recovery. Since that period, there has been no final settlement between the parties. All the receipts have been upon account, except that of October 1st, 1817, given by Walter to Webb for \$24.87 which purported to be in full for two years' rent. Mr. Morrell swears expressly that Mr. Webb had no authority to give a receipt in full; that his instructions to the clerks, of whom Webb was one, were to receive any money which Mr. Clark's tenants should pay, and give receipts on account. That receipt, therefore, is to be considered as a receipt on account merely. Now the rent which has fallen due since September 29th, 1813, up to which period it was settled by the receipt of July 16th, 1814, and the commencement of this suit, without calculating any interest, exceeds by some dollars the amount paid by the plaintiff. Mr. Morrell states the balance of principal and interest due Mr. Clarke, upon an accurate calculation upon this principle, on the 8th day of January, 1821, when this suit was commenced, to have been \$10.73. Whether Mr. Clarke, therefore exacted and received from the plaintiff at any period more rent than was due to him, is

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not the question. Whatever he received, he passed to the general credit of the plaintiff; and in this action the inquiry is, has the defendant received more from the plaintiff for rent than he was entitled to? The evidence clearly shows that he has not; and the plaintiff below, therefore, is not entitled to recover.

But it was said, upon the argument, that as more than \$50 had been paid by the plaintiff to the defendant for rent within six years, the judgment was supported, whether the opinion expressed by the court as to the statute of limitations was right or wrong. It is undoubtedly true, that a judgment will not be reversed on account of an erroneous opinion expressed, or decision made by the court, where it clearly appears that the error did not or could not have affected the error or the judgment.[1] But this very position implies that we are to look beyond the letter of the exception into the case itself, to ascertain what the effect of the error was. Now it is perfectly clear that if the court had charged the jury that all accounts between the parties prior to the last six years were barred by the statute of limitations, they could not have given a verdict for the plaintiff; for within the last six years he had not paid as much as he owed the defendant; and this point, therefore, properly arises upon this exception.

But although this view of the case, if I am correct in it, is conclusive, it may be well briefly to consider that which, upon the argument, was treated as the main point in the cause: It is embraced in the exception, that the payments made by the defendant in error, were made voluntarily with a full knowledge of all the facts in the case; and admitting that they exceeded the amount legally due, and that the statute of limitations was out of the question, the excess could not be recovered back, the mistake being in law and not in fact.

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Although there are a few *dicta* of eminent judges to the

[1] *Willoughby v. Cornstock*, 3 Hill 389. But a new trial will be granted for the mis-direction of the Judge, although the evidence may have warranted the verdict found, where the chances are equal, that the verdict resulted from that mis-direction. *Wardell v. Hughes*, 3 Wen. 418. See also *Cowen & Hill's notes*, 475, and authorities there cited.

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contrary, I consider the current and weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. [1] He shall not be permitted to allege his ignorance of law; [2] and it shall be considered a voluntary payment.

This position was broadly stated by Buller, J., in *Lowry v. Bourdieu*, (Dougl. 470,) without any question, or the expression of any doubt or disapprobation by the rest of the judges. Although it is true that that case may have been, and probably was determined on the ground that the policy upon which the premium had been paid was a gaming policy, that the parties were in *pari delicto*, and that the law would not aid the plaintiff in recovering back what he had paid under such circumstances; still it is not to be supposed that Lord Mansfield and Mr. Justice Ashurst would have suffered the *dictum* to have passed without animadversion, if they had not assented to its correctness

[1] *Hunt v. Rausmanier's adm'rs*, 8 Wheat. 174: Cond. 400, S. C. 1 *Peters Sup. C. R.* 1, S. C. 2 *Mason* 342. *Chaplin v. Layton*, 6 Page 189. S. C. 18. *Wen.* 407, *Broom's Maxims*, 3d ed. 185. *McCarty v. Decaix*, 2 *Russ. & My.* 614: Cond. 192. In the last case the husband obtained a divorce from his wife, and believing it to be legal when it was not, renounced his title to his wife's property, supposing he had no lawful title thereto; he also was under a mistake of fact, as to the amount of the property renounced, which the other party knew, but withheld the information which he should have disclosed; the relief was granted on mixed considerations. See *Ap. Ch. Digest*, by *Waterman*, tit. *Mistake of Law*.

[2] There seems to be a distinction between mere ignorance of law, which is incapable of proof, and a mistake of law, which can be established by evidence. *Laurence v. Beaubin*, 2 *Bail Law*, R. 623; and Senator *Paige* in *Chaplin v. Layton*, 18 *Wen.* 423, adopted this distinction; see *Hall v. Reed*, 2 *Barb. Ch.* 505.

But if a party, acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another, under the name of compromise, the court of equity will relieve him from the effect of his mistake. *Naylor v. Winch*, 1 *Sim. & Stu.* 565; but where a compromise of a doubtful claim is entered into fairly, with due deliberation, and upon consideration, the court will not enquire into the adequacy of the consideration, *id.* 555.

In *Knibbs v. Hall*, (1 Esp. N. P. Cas. 83,) a tenant was not permitted to recover back from his landlord, or to be allowed by way of set off, a sum of money which he had paid beyond the rent which was actually due from him. The landlord demanded 25 guineas, and threatened him with a distress if he did not pay it. The tenant insisted that he had taken the premises at 20 guineas, and offered to pay that sum; but under the supposition that he could not defend himself against the distress, paid the 25 guineas, and was not permitted to recover back or set off the excess, it being held a voluntary payment. So in *Brown v. McKinnally*, (1 Esp. N. P. Cas. 279,) and *Marriott v. Hampton*, (2 Esp. N. P. Cas. 546,) the same principle was recognized.

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*In *Buller v. Harrison*, (Cowp. 555,) the money was paid under a mistake in fact. The assurer, upon a representation that a loss had been sustained by one of the perils covered by the policy, paid the insurance to the agent of the assured. But soon learning that it was a *foul loss*, in the language of the case, he gave notice to the agent of the fact, and also not to pay over the money. The only question discussed in the case was, whether in judgment of law the money had been paid over by the agent before he received the notice. The plaintiff's right to recover against the principal was not questioned.

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The case of *Bilbie v. Lumley*, and others, (2 East, 469,) was also an action by an underwriter, to recover back from the assured £100, which he had paid upon the policy. The ground on which the action was brought was, that the money had been paid under a mistake, the defendant not having disclosed to the plaintiff, at the time the insurance was effected, a letter relating to the time of the sailing of the ship insured, which it was admitted was material. But it appeared that before the loss was adjusted and the money paid on the policy, all the papers, including the letter in question, were submitted to the plaintiff. The counsel for the plaintiff put his case on the broad ground that it was sufficient to sustain the action, that the money had been paid under a mistake of the law, the plaintiff not being

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apprised at the time of the payment, that the concealment of the particular circumstance disclosed in the letter was a defence to any action which might have been brought on the policy. When the case was stated at bar, Lord Ellenborough would not hear it argued. He said he had never heard of a case in which a party who had paid money to another voluntarily, with a full knowledge of all the facts of the case, had been permitted to recover it back, on account of his ignorance of the law, except the case of *Chatfield v. Paxton*, (in a note to *Bilbie v. Lumley*) in which Lord Kenyon, at *nisi prius*, had dropped an intimation of that sort. Now, upon examination, it will be found that in the case of *Chatfield v. Paxton*, a majority of the judges put the case upon the ground that the payment had been made by the plaintiff, *not with a full knowledge of the facts, but only under a blind suspicion of the case*. Lord Ellenborough says that it was so doubtful on what point that case turned, that it was not ordered to be reported.

In *Stevens v. Lynch*, (12 East, 38,) the plaintiff was the indorser, and the defendant the drawer of a bill of exchange. The defence was, that the plaintiff had given time to the acceptor after his dishonor of the bill. But it appeared that the defendant, with a full knowledge of that fact, said, "I know I am liable, and if Jones (the acceptor) does not pay it, I will." The court say the defendant made the promise with a full knowledge of all the circumstances, and cannot now defend himself upon the ground of his ignorance of the law when he made the promise.

The cases of *Chatfield v. Paxton*, and of *Bize v. Dickson*, (1 Term Rep. 285,) were cited for the plaintiff upon the argument. But the court said they considered those cases to have proceeded on the mistake of the person paying the money under an ignorance or misapprehension of the facts of the case.

In the late case of *Brisbane v. Dacres*, (5 Taunt. 144,) this subject was elaborately considered by the court of common pleas, and the principle of *Bilbie v. Lumley* recognized and adopted. *Brisbane* was the captain of a frigate belonging to a squadron under the command of Admiral

Dacres, the testator of the defendant, upon the Jamaica station; and in obedience to the orders of the admiral, in April, 1808, he received on board his frigate \$700,000 belonging to government, and proceeded with the same to Portsmouth. He also received on board between one and two millions of dollars belonging to individuals, to be delivered at the bank of England. The government and individual money was delivered according to order, and Captain Brisbane received from the government for the freight of the former £850; and from the bank of England, upwards of £7000 for the freight of the latter. He paid over to the admiral one third of the sums thus received, under the belief that he was legally entitled to it; but upon discovering that he was not, he brought this action to recover it back. It was shown to be the usage in the navy, for the captains of vessels carrying public and private treasure, "to pay one third of the freights of the same to the commander of the squadron to which they belonged, though it was admitted that since 1801, the admiral had in such cases no legal claim to any portion of the allowance. But the court held that the money having been paid with a full knowledge of all the circumstances and facts in the case, could not be recovered back because it had been paid under a misapprehension of the law. As to the freight for the money belonging to individuals, it was held that Captain Brisbane had no right to carry it; that the whole of that part of the transaction was illegal; and that the parties being *in pari delicto*, the law would aid neither. But as to the other portion of the demand, it was put upon the broad ground which I have stated against the opinion of Mr. Justice Chambre. Mr. Justice Gibbs says, where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he never can recover back the sum he has so voluntarily paid. By submitting to the demand, he that pays the money gives it to the person to whom he pays it, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; and it would be most mischievous and unjust, if he who

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has acquiesced in the right by such voluntary payment should be at liberty at any time within the statute of limitations, to rip up the matter, and recover back the money.

Against these cases and a variety of others in which the same principle is acknowledged with more or less distinctness, there is nothing to oppose but the dictum of De Grey, Ch. J. in *Farmer v. Arundel*, (2 Black. Rep. 825,) and of Lord Mansfield in *Bize v. Dickson*, (1 Term. Rep. 285.) The observation of Ch. J. De Grey is, that "When money is paid by one man to another, as a mistake either of fact or of law, or by deceit, an action will lie to recover it back." But in that case the action was not sustained, although the money had been paid by the plaintiff under a clear mistake of law. The case, therefore, not only did not call for the dictum, but is in direct hostility with it. The proposition of Lord Mansfield in *Bize v. Dickson* was, that "Where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in an action of *assumpsit*." If his lordship meant mistake in fact, the proposition is undoubted; and that he did so mean and express himself, Mr. Justice Gibbs, in his opinion in *Brisbane v. Dacres*, infers with great force, from the circumstance that Lord Mansfield had six years before, in *Lowry v. Bourdieu*, heard it said by Mr. Justice Buller, that "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and Buller, justice, sat by him in *Bize v. Dickson*, and would not have heard the contrary of that doctrine stated without noticing it. The only point to which the attention of the defendant's counsel, in *Bize v. Dickson*, seems to have been directed was, whether the case came within the principle of *Grove v. Dubois*, (1 Term Rep. 112;) and the court having expressed an opinion that it did, he abandoned the case, without adverting to the distinction that in *Grove v. Dubois*, the broker had been allowed merely to set off his demand, and here he sought to recover back a sum which he had actually paid.

Chief Justice Mansfield in *Brisbane v. Dacres*, in advert

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ing to these propositions of Ch. J. De Grey and Lord Mansfield says, "It certainly is very hard upon a judge, if a rule which he lays down generally, is to be taken up and carried to its full extent. Great caution ought to be used by the court in extending such maxims to cases which the judge who uttered them never had in contemplation."

If money paid under a mistake of the law, though with a full knowledge of the facts in the case, can be recovered back in all cases where the party to whom it is paid is not in conscience and equity entitled to it, what is the practical distinction between a mistake in fact and mistake in law. A party who has paid money under a mistake in fact, cannot recover it back unless he is equitably entitled to it. The inquiry in every case, therefore, must be, not whether the money was paid under a misapprehension of the law, or in ignorance of the fact, for that is immaterial, but whether the party to whom it was paid can in equity and conscience retain it. If he cannot; if there was any mistake of any character, he shall refund.

If this be so, why has this question been so frequently and elaborately discussed, not only in the English but in our own courts; and not only in the courts of common law, but in courts of equity? How are the cases of *Bilbie v. Lumley*, and of *Brisbane v. Dacres* to be reconciled with this principle? What ground of conscience or equity had Admiral Dacres for retaining the money paid to him? He had neither incurred hazard nor rendered any labor or service in its transportation. Captain Brisbane was not his servant, nor was the ship which carried it his property. Chief Justice Mansfield, in his solicitude to avoid collision with the *dicta* of Chief Justice De Grey and Lord Mansfield, does indeed suggest a ground of equity for the defendant. He says, "So far from its being contrary to *equum et bonum* I think it would be most contrary to *equum et bonum* if he were obliged to repay it; for see how it is: If the sum be large, it probably alters the habits of his life; he increases his expenses; he has spent it over and over again; perhaps he cannot pay it at all, or not without great distress." If the fact of having expended the

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money, or of its being inconvenient to repay it, is a sufficient ground of equity to enable the party who has received it under a mistake of law to retain it, I apprehend that it will practically amount to the same thing as holding that it shall not be recovered back. But with great respect, I think his lordship might better have denied those *dicta* to be law, as Lord Ellenborough did in *Bilbie v. Lumlie*, than to have sought to evade them by this gloss.

Chief Justice Marshall thought there was a distinction between a mistake in fact and a mistake in law, when he said in *Hunt v. Rousmanier*, (8 Wheaton, 215,) "Although we do not find the naked principle that relief may be granted, on account of ignorance of law, asserted in the books, we find no case in which it has been decided that plain and acknowledged mistake in law is beyond the reach of equity." Chancellor Kent thought such a distinction existed, when he said in *Lyon v. Richmond*, (2 John. Ch. Rep. 51,) "Courts do not undertake to relieve parties from their acts and deeds *fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe or practicable in the common intercourse of mankind." The principle upon which courts refuse to relieve against mistakes in law is, that in the judgment of law there is no mistake; every man being held, for the wisest reason, to be cognizant of the law. The act, therefore, against which the party seeks relief, is his own voluntary act, and he must abide by it. This principle steers entirely clear of the conscience or equity of the transaction.

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In this case, therefore, the rent having been reserved in sterling money, and its value in our currency being fixed by statute, and therefore a question of law, if the plaintiff, on settling his rent at the rate of £4 14s. currency for £2 10s. sterling, acted under an erroneous impression that that was its legal value, he cannot now recover back the excess. The rent was demanded by the landlord as his right. By submitting to the demand, as Mr. Justice Gibbs expressed it, he *gives* the money to the party to whom he pays it

and closes the transaction for ever. The judgment of the common pleas must be reversed.

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Judgment of reversal.

ORDER against STORMS.(a)

TRESPASS, for taking, driving away, and converting three cows and a calf of the plaintiff, tried at the Westchester circuit, October, 1824, before WILLIAMS, C. Judge.

The plea was the general issue, with notice that the cattle were distrained by the defendant damage feasant, and impounded and sold according to the statute, &c.

*At the trial, it appeared that the plaintiff's daughter was married to an intemperate husband about 19 years before; the plaintiff promised his daughter two cows when she went to housekeeping with her husband, which was about two years after, when the plaintiff, in order to secure to her the use of two cows, loaned them to her and her husband; and they had the cows with their increase afterwards. Two of the cows and the calf in question were the stock of the old cows loaned. The other cow in question was loaned by him to his daughter about three years before the trial. The two cows first loaned had been killed by the husband, and one of them sold by the consent and direction of the plaintiff; and the daughter and her husband purchased another cow with the avails with the like consent. The other was used in the family. The old cows, or their young, had continued in the family from the time of their being loaned; were used, and exchanged for others as occasion required, always with the concurrence of the plaintiff.

The defendant distrained the cattle about the 17th of July 1824, as damage feasant on certain premises which he claimed as the proprietor and possessor, and over which

A plaintiff having a right to personal property to another, for an indefinite time, may maintain trespass for taking it. Where a father loaned two cows to his

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daughter, which, or their young, continued in her possession 17 years, *semb.* the father might maintain trespass for taking them or their young from the possession of the daughter or daughter's husband.

One purchases land upon a decree of the court of chancery. He may enter peaceably and take possession without writ, and being so in possession, may distrain cattle *damage feasant*.

Though *semb.* if he enter forcibly, he would be subject to an indictment.

(a) This cause was decided in February term, 1826.

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he had exercised various acts of ownership; and afterwards caused them to be sold.

The defendant's counsel moved for a nonsuit, on the ground that the cattle were not in the plaintiff's possession; but in the possession of the defendant. The motion was overruled.

The counsel then submitted whether a title had been shown in the plaintiff to the two cows and calf raised by the daughter and her husband; and the judge decided that it had.

The defendant then proved that the land on which he distrained the cattle in question was, on the 1st of June, 1824, sold and conveyed to him by a master in chancery, as the land of the plaintiff, and his son-in-law, and his daughter and others, pursuant to a decree of the court of chancery against them. The defendant entered upon the land so purchased by him, in the latter part of June, or on the 1st of July, 1824; turned his horse upon it, and authorized another to depasture his horse there, who did so. There were no cattle on the land when the defendant entered; nor did he meet with any resistance; nor was he forbidden to enter by any one. There was no house on the lot. It appeared that the son-in-law had been in possession of it 17 years before, and up to the time of the entry. Subsequent to his first entry, the defendant had several times turned his horse upon the land and authorized another to turn in a horse, who had done it accordingly; and once before distraining had, on finding cattle upon the lot, turned them into the street, and turned in his own horse: but on retiring took him away. He had also requested the daughter to give him possession of the lot, which she had declined.

The judge charged the jury, that though the defendant had the right of possession, he had not made out such an actual possession as entitled him to distrain; and the jury found a verdict for the plaintiff.

R. R. Voris, for the defendant, moved for a new trial. He insisted that the plaintiff had not made out a title to the

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young of the two cows first loaned. The defendant had a right to enter and take possession; (*McDougall v. Sitcher*, 1 John. Rep. 42; *Taylor v. Cole*, 3 T. R. 292; *Hyatt v. Wood*, 4 John. Rep. 150; *Rol. Abr.* 738;) and having done so, his right to distrain was complete.

As to the plaintiff's title, he said the young of tame animals belonged to the hirer of the dam, unless otherwise agreed. (*Cowen's Treat.* 160. 8 John. 435.) The very object of this lending was that the daughter should have the profit of the cows, which included their young. Besides; these cows were promised before marriage; 19 years before the trial; and being delivered upon such consideration, they and their young remaining in the daughter's use and possession so long, the character of a loan ceased; and the husband became the absolute owner.

A. Ward, contra. No doubt the plaintiff had such a constructive possession as entitles him to bring trespass. (*Putnam v. Wiley*, 8 John. Rep. 432. 1 T. R. 180, 190, *id.* 12. *2 *Saund.* 47, a, c, d, k. 2 *Bulstr.* 268. *Bac. Abr. Execution (H.)* 1.)

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The plaintiff made a mere loan of the cows, and might resume the possession at any time. (*Putnam v. Wiley*, 8 John. Rep. 432.)

The defendant was not in actual possession; nor had he a right to take possession without ejectment. There is no dispute, that the former possessor was in; and had not abandoned the possession.

Curia, per SAVAGE, Ch. J. The first question to be considered is, whether the plaintiff had such a property in the cattle as to be able to maintain trespass? For this purpose, he must have had the actual or constructive possession at the time; and the latter is, when he has such a right as to be entitled to reduce the goods to actual possession at any time. [1] (8 John. Rep. 435. *Bac. Abr. Trespass (C.)* 2. 1 T. R. 480.) As to one of the cows there is no question; and as to the residue, he does not

[1] *Root v. Chandler*, 10 Wen. 110

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seem ever to have relinquished his property ; nor had his son-in-law the use of the cows for any specific time. He no doubt intended the cows for the use of his daughter ; but did not mean to place them where her husband, or his creditors, could dispose of them. He acted according to the dictates of humanity ; and will be protected by law, while he retains the right of the property in himself, as that draws after it the right of possession. In my opinion the plaintiff had a right to bring this action, and must recover, unless the defendant had a right to distrain the cattle.

To justify as for a distress damage feasant, the defendant must show that he had actual possession of the land trespassed upon. That he had the legal title as against the plaintiff there is no doubt. Had he a right to take possession himself, or should he be driven to his action of ejectment ?

In the case of *Taylor v. Cole*, (3 T. R. 292,) to an action of trespass the defendant pleaded, that by virtue of a *f. fa.* he sold the interest in a certain term in the opera house to T. H., who afterwards entered into the house, the door being open ; and peaceably and quietly expelled the plaintiff. *To this plea the plaintiff demurred ; and Lord Kenyon says, " It is true that persons having only a right, are not to assert that right by force ; if any violence be used, it becomes the subject of a criminal prosecution. The question is, whether a person having a right of possession, may not peaceably assert it, if he do not transgress the laws of his country. I think he may ; for a person who has a right of entry, may enter peaceably ; and being in possession, may retain it ; and plead that it is his soil and freehold."

The case of *Taunton v. Costar*, (7 T. R. 427,) was an action of replevin. The defendant was tenant from year to year. The landlord (the plaintiff) gave notice to quit, but the defendant retained possession after the end of the year. The plaintiff entered, and put his cattle upon the *locus in quo* ; and the defendant distrained ; upon which the plaintiff brought replevin. Lord Kenyon said, " The case is too plain for argument. Here is a tenant from year to year.

whose term expired upon a proper notice to quit; and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear that the landlord could have justified under a plea of *liberum tenementum*." This case is very much like the present. It has been decided, that, under a sale by a sheriff upon *fi. fa.*, the tenant becomes *quasi* tenant at will to the purchaser. The same reason holds in case of a sale by a master in chancery. They are both judicial sales. The defendant then was landlord to the son-in-law; and entered peaceably, after the tenant's interest had expired. *Taunton v. Costar* shows that no action of trespass could be sustained against the defendant; nor had the tenant a right to distrain the defendant's cattle when he had put them in the lot.

In this court, too, there is abundant authority to justify the entry of the defendant. The case of *McDougall v. Sitcher*, (1 John. 40,) decides, that the purchaser of real estate under a *fi. fa.*, may enter peaceably; although the defendant's property is on the premises, and they are occupied by the defendant's servants. In that case, the servants of the former owner occupied the shop in the day, and locked it at night. *The next morning the purchaser was in possession; and the court said that a purchaser at a sheriff's sale may enter upon the property left in the situation this was by one who was defendant in the judgment; that he may retain the possession, and plead it to be his soil and freehold, to any suit brought by the debtor.

In the case of *Hyatt v. Wood*, (4 John. 150,) the language of the court is still stronger, and justifies the idea that, as between the parties, and landlord may enter by force upon a tenant at sufferance, and turn him out; though as between the landlord and the people, he would be subject to an indictment. (*People v. Nelson*, 13 John. 340.)

The judge at the trial of this cause was of opinion that the defendant had not such a possession in fact, as would authorize the distress. *Taunton v. Costar*, I think, shows that he must be considered in possession. He had, in fact,

ALBANY,
Feb. 1826.

Order
v.
Storrs.

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ALBANY,
Feb. 1825.

Hasbrouck
v.
Schoonmaker.

taken all the possession the property was susceptible of and was the only person lawfully in. He was therefore authorised to distrain. In my judgment, the plaintiff cannot recover, and a new trial must be granted

New trial granted.

HASBROUCK and others *against* SCHOONMAKER. (a)

In trespass for cutting, under the act, (1 R. L. 525,) for a wilful trespass where the whole recovery is less than \$50, in favor of the plaintiff, he must pay costs to the defendant.

IN trespass *quare clausum fregit*, and for cutting wood and timber, contrary to the statute, (1 R. L. 525.) The plaintiff recovered \$6, which the court at October term, 1824, trebled on motion; but they refused to treble the costs. (3 Cowen's Rep. 346, S. C.) The defendant afterwards perfected a judgment in his own favor for his costs, which

C. H. Ruggles now moved to strike out.

J. Sudam, contra.

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Curia. The particular statute, (1 R. L. 525,) upon which the plaintiffs recovered, would doubtless have given them full costs, under the words, "to be recovered with costs before any court having cognizance of the suit." But the 5th section of the act extending the jurisdiction of justices, denies costs in all cases cognizable before a justice, unless the plaintiff recover more than \$50. (Laws vol. 4, 80 c. (a) This does away and completely repeals the particular clause touching the costs in the act itself, and throws the case upon the general act concerning costs, which clearly gives them to the defendant.

Motion denied

(a) This cause was decided in February term, 1825.

(a) Re-enacted sess. 47, ch. 238 s. 33.

ANDRUS *against* BEALLS and others. (a)UTICA,
August, 1824.

Andrus

v.
Bealls.

PLACITA of August term, 1823—Memorandums of warrants of attorney—memorandum of May term, 1823.

Jefferson county, ss. The people &c. sent to the sheriff of Jefferson county their writ close in these words, to wit: The people, &c. to the sheriff of the county of Jefferson, greeting: Whereas David J. Andrus, heretofore, to wit, in the term of August, A. D. 1819, in our supreme court of judicature, before our justices of the same court, at, &c. by bill without our writ, and by the judgment of the same court recovered against Joseph D. Bealls, David Smith, David Hale, Joseph Sterling, Elishu Morton, Almerin Tucker and Caleb Earl, a certain debt of \$10,000; and also \$91.95, which in the same court were adjudged to the said David J. Andrus for his damages which he had sustained as well on occasion of the detaining of that debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said Joseph D. Bealls, &c. were convicted as by the record and proceedings thereof remaining in our said court, before our justices aforesaid, manifestly appears. And afterwards now here, comes the said David J. Andrus, before the justices aforesaid, by R. Lansing, his attorney, and according to the form of the statute in such case made and provided, gives the same court here to understand and be informed, that the said judgment was so recovered against the said Joseph D. Bealls, &c. as aforesaid, upon and by virtue of a certain bond or writing obligatory in the penal sum of \$10,000, bearing date the 18th day of March, A. D. 1816, sealed with the seals of the said Joseph D. Bealls, &c. under and sub-

Record of proceedings in *sci. fa.* on a judgment in debt on the surety bond of a deputy sheriff, including the writ of declaration, pleas, &c.

It is no answer for the sureties in an action on a bond by a deputy sheriff given to the sheriff, for the faithful performance of the

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duty of the deputy, &c. that before the alleged default of the deputy, he had become insolvent in consequence of which the sureties requested the sheriff to remove him from his office. [1]

It is no defence for sureties in an action on their bond of indemnity, that the obligee neglected to defend the suit against him, by which he was damnified

[1] See also *Bernard v. Darling*, 11 Wen. 28.

within the terms of the bond.

Thus, where a deputy sheriff collected money on a *fi. fa.* and neglected to pay it over, and the sheriff being attached for not returning the writ, paid the money voluntarily, without defending the attachment suit; yet *held*, that the sureties in the bond of indemnity given by the deputy to the sheriff, were liable.

(a) This cause was decided in August term, 1824.

UTICA,
August, 1824.

Andrus
v.
Bealls.

Declaration
on judgment
sci. fa. setting
forth further
breach on the
bond of a de-
puty sheriff,
and sureties,
being a copy
of the writ of
sci. fa. (Vid. 3
Chit. Pl. 1289,
5th Am. from
4th Lond. ed.)

Condition of
bond recited.

Commence-
ment and ob-
ject of the or-
iginal action.

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Further
breach.

ject to a certain condition thereunto subscribed, whereby after reciting that whereas the above named Joseph D Bealls was, at his special instance and request, appointed by him, the said David J. Andrus, a deputy sheriff, under him the said David J. Andrus, within and for the county of Jefferson, it was declared by the said condition, that if the said Joseph D. Bealls did and should faithfully serve and execute within the said county of Jefferson, all writs, warrants, precepts and processes to him directed and committed, issued from good and lawful authority, and should perform and execute all the duties pertaining to the office of a deputy sheriff, required by the laws of the state of New York, and should save and keep harmless and indemnified the said David J. Andrus, his executors and administrators, of and from all actions, suits, troubles, costs, charges, damages and expenses whatsoever, on account or by reason of any mal-feasance, mis-feasance or non-feasance of him the said Joseph D. Bealls, in his said office of deputy sheriff, then the said obligation should be void and of no effect, otherwise the same should be and remain in full force and effect. And the said David J. Andrus also gives the said supreme court of judicature here to understand and be informed, that the bill of him the said David J. Andrus, in the said action in which he so recovered such judgment as aforesaid, was exhibited upon the first Monday of January, in January term, A. D. 1819; and that said action was commenced for and upon certain breaches of the condition of the aforesaid writing obligatory, by the said Joseph D. Bealls, before the exhibiting of the bill aforesaid. And the said David J. Andrus, for a further and other breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, gives the said court of the people aforesaid here to understand and be informed, that after the making of the said writing obligatory, and while the said Joseph D. Bealls was deputy sheriff as aforesaid, he did not execute the office of deputy sheriff according to law, nor did he keep harmless and indemnify the said David J. Andrus of and from all actions, suits, troubles, costs,

charges, damages, and expenses whatsoever, on account of any mal-feasance, mis-feasance, or non-feasance of him the said Joseph D. Bealls, in said office of deputy sheriff; but that the said David J. Andrus hath been made liable to the payment of a large sum of money, to wit, the sum of \$77 31, on a *testatum fieri facias* issued out of the supreme court of judicature of the people of the state of New York, in favor of Wheeler Barnes, plaintiff, against Abel Franklin, Joseph Dickey and Lodowick Salisbury, defendants, which said writ of *testatum fieri facias* was directed to the sheriff of Jefferson county, and was committed to the care of Joseph D. Bealls, as deputy sheriff of said David J. Andrus, the said David then being sheriff of said county of Jefferson, and while the said Joseph D. Bealls exercised said office of deputy sheriff, to be executed according to law, which said sum of money, together with the sum of \$87 69, being for interest due the said Wheeler Barnes on the monies directed to be levied on the execution aforesaid, and the costs of collecting the same, in the whole amounting to a large sum of money, to wit, the sum of \$163, the said David J. Andrus has been obliged to pay, and hath paid to said Wheeler Barnes, to wit, on the 31st day of January, 1823, in consequence of the negligence and fraud of the said Joseph D. Bealls, while deputy sheriff as aforesaid, and in consequence of the said Joseph D. Bealls not paying the money received by him on said execution either to the said David J. Andrus or to said Wheeler Barnes, which last breach of the condition so assigned, the said David J. Andrus doth aver and give the court here to understand and be informed, is a further and other breach of the condition than the said breaches for and by reason of which he obtained said judgment so recorded by him as aforesaid, and for which said other and further breach of the aforesaid condition of the said writing obligatory the said David J. Andrus, hath humbly besought us to provide him a proper remedy: And we being willing that what is just in this behalf should be done, do, according to the form of the statute in such case made and provided, command you, that by honest and lawful men of your bailiwick, you make

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Bealls.

Plaintiff made
liable to pay
moneys col-
lected by deputy
on *fi. fa.*
and not paid
over.

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August, 1824.

Andrus
v.
Bealls.

Appearance of
plaintiff at re-
turn day; Re-
turn of the
sheriff.

Appearance
of defendants.
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Prayer of exe-
cution.
Plea non dam-
nificatus, by
three of the
defendants.

known to the said Joseph D. Bealls, &c., that they be before our said justices of the supreme court of judicature aforesaid, on the first Monday of May next, at the City Hall of the city of New York, to show cause why execution should not be had and awarded against them upon said judgment so obtained as aforesaid, for the damages which the said David J. Andrus hath sustained by reason of the said further and other breach of the said condition of the said writing obligatory, if it shall seem expedient for the said Joseph D. Bealls, &c., so to do, and further to do and receive what our said court, before our justices thereof, shall then and there consider of them in this behalf; and have you then there the names of those by whom you shall so make known to them, and this writ. Witness, &c. at, &c., the 18th day of January, A. D., 1823. At which day, before, &c. at, &c. comes the said David J. Andrus, by *R Lansing*, his attorney; and the sheriff, to wit, Jason Fairbanks, Esquire, sheriff of Jefferson county aforesaid, here now returns, that by John Doe and Richard Roe, honest and lawful men of his bailiwick, he made the within named Joseph D. Bealls, &c. to know that they be before the said justices, at the day and place in the said writ mentioned, to show, &c. as by the said writ they are required, and as the said sheriff is therein commanded; and that the said Caleb Earl had nothing in his bailiwick by which he could make him know, nor is he found in the same. And the said Joseph D. Bealls, &c., being solemnly demanded, come by *William D. Ford*, their attorney, and hereupon the said David J. Andrus prays that execution may be adjudged to him against the said Joseph D. Bealls, &c., of the debt and damages aforesaid, according to the force, form and effect of the said recovery, &c.

And the said Joseph Sterling, Caleb Earl and Almerin Tucker, three of the defendants above named, come and defend the wrong and injury, when, &c. and say that the said plaintiff hath not sustained any damage by reason of any matter, cause, or thing in the said condition of the said bond or writing obligatory contained, neither hath the said plaintiff become liable to pay, or been obliged to pay,

hath paid the said sum of money in the said assignment the said supposed other and further breach of the said condition, as is set forth in the plaintiff's declaration, by reason of any fraud or negligence of the said Joseph D. Bealls, in the said office of deputy sheriff under the said plaintiff, as sheriff as aforesaid. Wherefore they say that the said plaintiff ought not to have execution against the said three defendants for the said supposed other and further breach of the said condition of the said bond or writing obligatory mentioned in the declaration of the said plaintiff; and of this they put themselves upon the country, &c.

And the said David Hale, David Smith, and Elihu Morton, three other of the said defendants above named, for plea in this behalf say, that after the making of the said bond in the declaration of the said plaintiff mentioned, and before the delivery of the said writ of *testatum fieri facias* to the said Joseph D. Bealls, the said Joseph D. Bealls was, and did become totally insolvent, which fact being well known to the said plaintiff and the said three other defendants, they, the said three other defendants, before the delivery of the said writ to the said Joseph D. Bealls, urged and requested the said plaintiff to amove and discharge the said Joseph D. Bealls from the said office of deputy sheriff, for the purpose of indemnifying them, the said three other defendants, as the bail of the said Joseph D. Bealls against the insolvency of the said Joseph D. Bealls, which the said plaintiff neglected to do; whereby the said three other defendants, as the bail of the said Joseph D. Bealls, were deprived of any means of indemnifying themselves against the insolvency of the said Joseph D. Bealls; and this they are ready to verify; wherefore they pray judgment if the said plaintiff ought to have execution against them, for the said other and further breach of the said condition of the said bond, as set forth in the said declaration.

And the said three defendants last named for a further plea, &c. say, that the said writ of *testatum fieri facias* mentioned in the plaintiff's declaration, was delivered to

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v.
Bealls.

Special plea
by three other
defendants.

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Another special plea by same defendants.

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Bealls.

the said Joseph D. Bealls after the issuing thereof, to wit, on the 13th day of January, 1818; and after the return day thereof, to wit, on the 20th day of April, 1822, a rule was entered in this same court, requiring the said David J. Andrus to return the said *testatum fieri facies* within 20 days after he should have notice of the said rule, or that an attachment would issue against him; notice of which said rule was given to the said David J. Andrus after the entry thereof, to wit, on the 30th day of April aforesaid, according to the rules and practice of the said court; previous to which last mentioned day, and after the return day of said writ, the said Joseph D. Bealls became notoriously insolvent; and afterwards, to wit, on the 20th day of July, in the year last aforesaid, the said David J. Andrus, not having returned the said writ in pursuance of the said rule, a writ of attachment was issued against him, for his default in not returning the said writ, in favor of the people of the state of New York, directed to the sheriff of Jefferson county, by which said writ the said sheriff was commanded to attach the said David J. Andrus, and him safely keep, so that he might have him before the justices of the people of the state of New York, of the supreme court of judicature of the same people, at the capitol in the city of Albany, on the first Monday of August then next, to answer for certain trespasses and contempts in the said court done and committed; and after the delivery of the said writ of attachment to the said sheriff, and before the return day thereof, to wit on the first day of August, in the year last aforesaid, he the said sheriff arrested the said David J. Andrus by his body, by virtue of the said writ, and detained him in his custody thereon; until afterwards, to wit, on the same day and year last aforesaid, the said David J. Andrus appeared before one of the judges of the court of common pleas in and for the county of Jefferson, and then and there, with one George Andrus as his surety, entered into a recognizance before the said judge, conditioned that the said David J. Andrus should appear according to the exigency of the said writ; and the sheriff then and there, after the taking of the said recognizance, permitted the said David J. An

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drus to go wheresoever he would, out of his custody. And the said three defendants last named further say, that the said David J. Andrus did not appear according to the exigency of the said writ, but made default therein, by means whereof the said recognizance became forfeited, and was afterwards, to wit, on the seventeenth day of August afore said prosecuted in this same court; and afterwards, to wit, at the October term of this same court, of the year last aforesaid, judgment was recovered by default against the said David J. Andrus and George Andrus, for the penalty of the said recognizance; upon which judgment execution issued, directed to the sheriff of Jefferson county, and upon that execution and no other, the said David J. Andrus paid the said \$165 mentioned in the said declaration; so the said three defendants last named say that the said David J. Andrus paid the said sum of money for his own negligence and default, and not for any default of the said Joseph D. Bealls, in his said office of deputy sheriff, under the said plaintiff, as sheriff as aforesaid; and this they are ready to verify. Wherefore, &c. Bealls also pleaded. Imparance to August term, 1823. Similiter as to the first plea, and demurrer and joinder as to the 2nd and 3rd pleas.

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R. Lansing & E. Ten Eyck, in support of the demurrer.

1. As to the plea of notice to remove the deputy, if available at all, it must be so as setting up a release by operation of law, to which it bears no analogy. (a) We agree that courts have gone far to protect sureties against the fraud and connivance of the obligee; and when any act has been done by him which may in any way injure the surety, courts are very glad to lay hold of it in his favor. (b) But in all the cases where sureties have been relieved, it was on account of some act of the obligee contrary to good faith; or the neglect to do some act required by law, or by the express agreement of the parties. The People v. Jan- sen, (c) which will doubtless be relied on by the defendants, bears no analogy to the present. So also of Rathbone v. Warren. (d) In the first the plaintiffs had disobeyed the express injunctions of the statute which required them to

(a) Bac. Abr
Release (B).

(b) 4 Ves. 833.
1 Madd. Ch.
191, and cases
there cited.

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(c) 7 John. 332.

(d) 10 John.
587.

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(1) The People v. Berner,
13 John. 383.

remove the defaulting officer; and the case is put upon that ground. The latter was on the ground that the payee had, by a written agreement, extended the time of payment without the consent of the surety. Here was no duty to remove Bealls. (1) Only three of the bail made the request. The other three do not join in the plea, and must be considered as consenting to his continuance in office. Insolvency does not incapacitate him. Poverty will not do it. He may still be honest. The bond was general, *during his continuance in office*, which was during the plaintiff's pleasure. This the bail knew when they gave the bond; and the duration of their liability was known to depend on the same pleasure. A surety cannot discharge himself whenever he pleases. If these bail are discharged, the same rule must apply to officers of government, who hold their offices during pleasure, which, we believe, was never pretended.

(e) 13 John.
174.

The only analogous case is *Payn v. Packard*. (e) There the plea was that the surety was injured by the plaintiff's refusal to prosecute the principal on request; and it was holden good. But here is no averment of loss, or that the default was the effect of insolvency.

Again; the plea is bad because nothing can be pleaded to a *sci. fa.* which might be pleaded to the original action.

(f) 2 Tidd.
1047. 1 Salk.

2. Cook v.
Jones, Cowp.
727. McFar-
land v. Irwin,
8 John. 77.

(g) 1 Chit. Pl.
637.

(f) The plea should therefore aver expressly that the matter of defence arose after the original judgment; and not leave this to inference. It is, *quasi*, a plea *purs darrein continuance*; which requires great certainty. (g)

2. The second plea to which we have demurred, is no answer to the declaration. This sets up damages arising from Bealls' neglect to pay over monies; and the manner in which we were proceeded against is no defence. The defendants might as well set up any other proceeding in bar. Besides, the very facts set up in this plea are sufficient to entitle the plaintiff to recover; for the plea must be based upon the idea that Bealls had neglected to return the *fi. fa.* mentioned. If of any avail, it goes only to the costs; and is bad as being an answer to only a part of the action.

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W. D. Ford & D. Tillinghast, contra, relied on the cases of *Payn v. Packard* and the *People v. Jansen*, which they said are not distinguishable in principle from the present case. The former furnishes a precedent for the first special plea. It underwent great consideration, and was affirmed in the court of errors. (h) In *King v. Baldwin*, (i) the chief justice in delivering the opinion of the court, says of that case, "The principle adopted was, that where the creditors did an act injurious to the surety, or omitted to do an act when required, which equity and his duty to the surety enjoined it upon him to do, and which omission was injurious to the surety, in either of these cases the surety would be discharged." If the surety can protect himself by calling on the creditor to enforce payment, the reason is much stronger that he should be heard when he requests that a further debt should not be incurred. The *People v. Berner & Borst* (j) also sustains this plea.

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(h) 17 John
384.

(i) 17 John
384.

(j) 13 John
383.

It is a plain rule of common sense, that a surety ought never to be bound against his will, nor for a greater length of time than he sees fit. Common honesty and fair dealing require that when a man becomes bail or surety, he should have the power of extricating himself whenever he pleases. So is the case of special bail and bail to the sheriff. A request to the authority having the power of removal, would undoubtedly be sufficient for the surety in all cases, whether of the government or individuals.

True, as to the public, Bealls was in office during the plaintiff's will; but when the rights of the surety are in question, he must exercise that will for their benefit, or take the consequences upon himself. The sureties do not seek his discharge; but simply to secure themselves.

*It appears on the face of the declaration that this matter of defence arose after judgment. Besides, the rule confining a plea to a *sci. fa.* to subsequent matter, applies to those cases only where execution is sought for the money recovered by the original judgment.

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The facts in the second plea amount to a release by operation of law. Whenever the obligee does any act, or

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(k) 10 John.
594, 5.

(l) The People
v. Stevens. 9
John. 72. The
King v. The
Sheriff of Sur-
ry, 7 T. R.
452.

omits to do any act, by which the terms of the original undertaking are varied, the obligors are exonerated from liability.(k.) Permitting the recognizance to be forfeited by his non-appearance, precluded all defence. Yet there was a defence. Barnes neglected for 4 years to call for a return of the *f. fa*; and in the mean time Bealls failed. Such a delay discharged the sheriff from liability.(l) In *Rathbone v. Warren*, all the cases upon this point are ably reviewed by the late chief justice. He says, "there can be no transaction with the principal debtor, without acquainting the surety who has a deep concern in it. You cannot keep him bound, and transact his affairs without consulting him." The forfeiture of the recognizance shut out the defence of laches, and worked such a change in the rights of the parties, as to make the doctrine of *Rathbone v. Warren* applicable.

Again; the plea shows that no default has been committed by Bealls, for which Andrus has been made liable. The recovery was for Andrus' non-appearance upon the recognizance, as is confessed by the demurrer. Had he appeared on the return of the attachment, it is shown expressly that he would have been discharged. In the *People v. Spraker*,(m) it is said that the recovery upon the recognizance is only argumentatively evidence of default in office by the sheriff. Equity and good faith towards the bail required that he should have appeared and saved their defence. His own, not Bealls' neglect, was the occasion of his being made liable.

(m) 18 John.
391.

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SUTHERLAND, J. at first, thought the second plea, viz. of notice to revoke, &c. a good one, and that the facts stated operated to release the defendants, who were sureties; though he held the third plea bad, as the sheriff was not bound to defend on the attachment. (a)

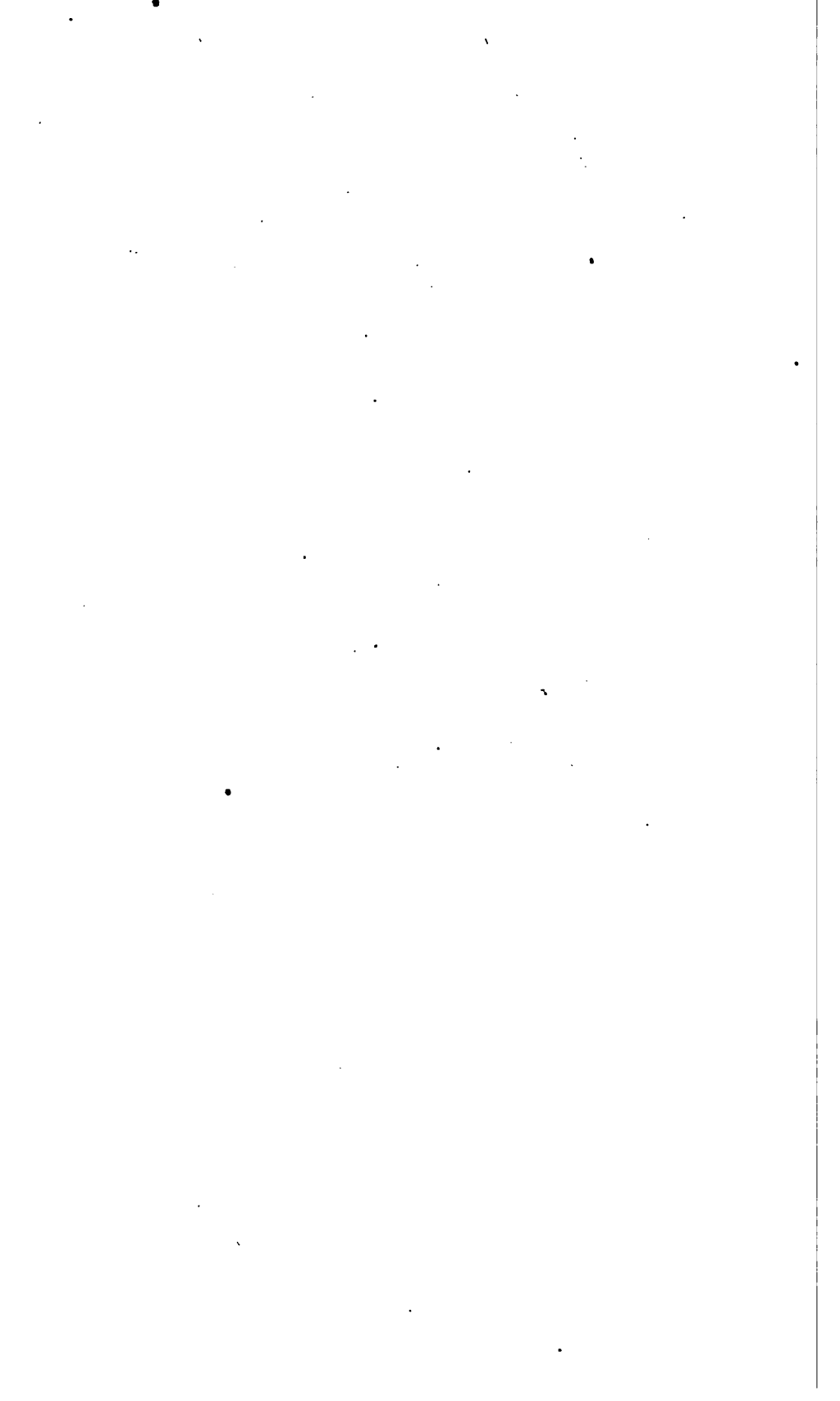
(a) Vide *Stone v. Hooker*, ante 184.

SAVAGE, Chief J. and WOODWORTH, J. were, however, UTICA,
against both pleas; and August, 1827

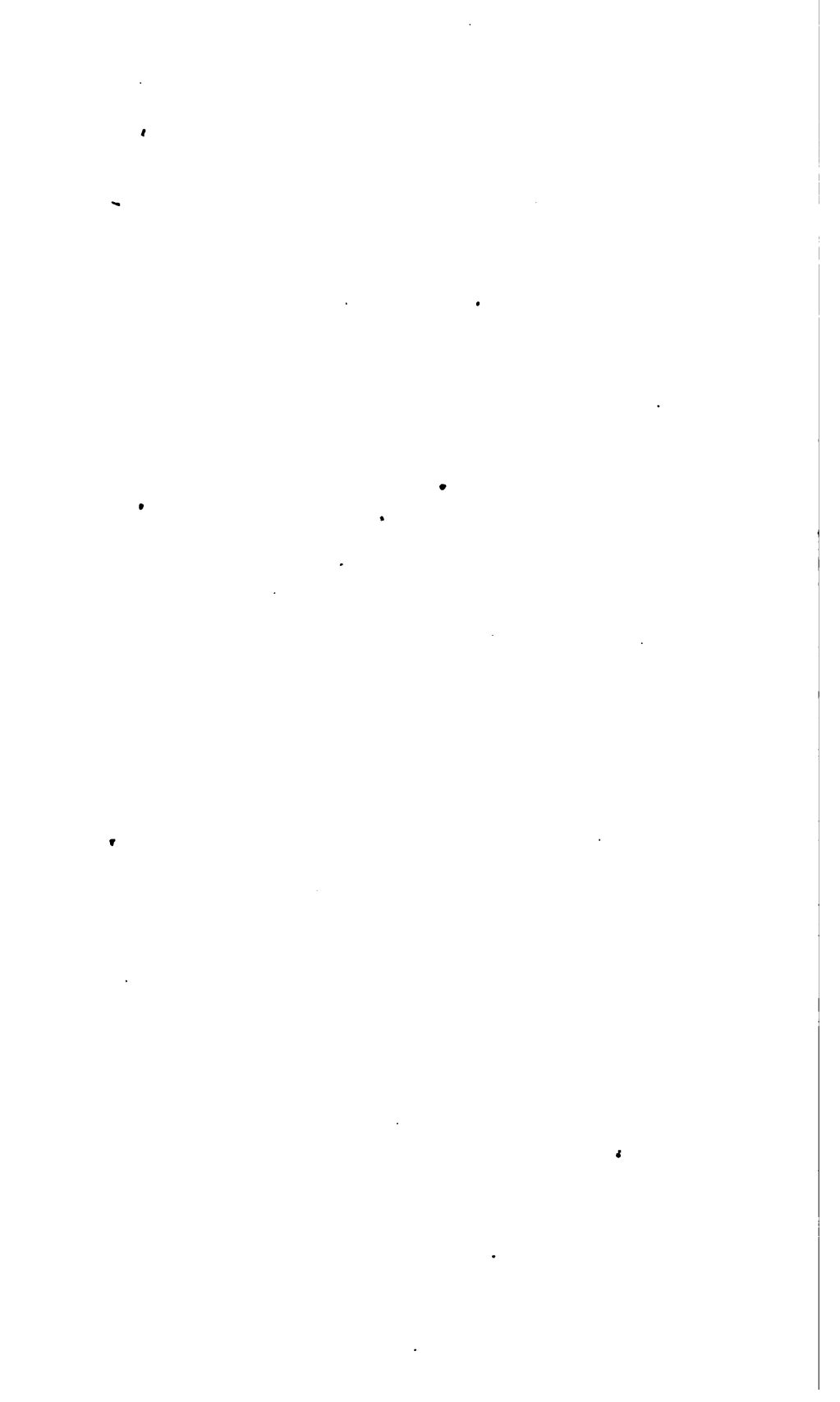
Judgment was for the plaintiff.

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END OF THE CASES IN THE SUPREME COURT.



CIRCUIT CASES.



CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS

AND

COURTS OF OYER AND TERMINER

OF THE

STATE OF NEW YORK.

Albany Oyer and Terminer, August 3d, 1827, Duns, Circuit Judge, presiding.

THE PEOPLE *against* ELSIE D. WHIPPLE.

ON the evening of yesterday, the 2nd August, the district attorney moved the court that Jesse Strang, who had just been convicted by a verdict of a jury, as a principal in the murder of which Mrs. Whipple, the prisoner at the bar, now stood charged as accessory before the fact, should

It is the nature of the crime, not the punishment which determines whether a convict is an admissible witness.

A conviction of treason, felony or any species of the *crimen falsi*, renders the convict incompetent to testify.

But to render him incompetent, the judgment as well as the conviction, must be proved.

The principal is a competent witness against the accessory.

So an accomplice is admissible as a witness against his co-partners in the crime.

But an accomplice is admissible or not in the discretion of the court; and when admitted, on his making a full disclosure, is entitled to a recommendation for pardon.

A motion should be made for the admission of an accomplice to testify, by the public prosecutor; and the court, under the circumstances of the case, will admit or disallow the evidence, as may most affectually answer the purposes of justice.

Sensd. what an accomplice states under oath against his associate would be inadmissible evidence against himself, on account of the implied promise of the court to recommend him to mercy.

Where one was convicted by verdict of murder and offered as a witness against an accessory before the fact, but appeared to have been the leader in perpetrating the crime, he was rejected.

An accomplice admitted to testify of one crime, may, though he behave well, be prosecuted for another crime, the implied promise of pardon not extending to that. And if it appear that he is charged with any other felony than that in relation to which the prosecutor moves for his admission as a witness, this fact of itself will be sufficient ground for rejecting him. (See note (c) at the end of this case.)

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be brought up and examined as a witness on the part of the prosecution. This was objected to by the prisoner's counsel; and it was agreed that the question should be argued and considered as if Strang had been called to the stand, and declared his willingness to be sworn and examined.

DUMR, C. Judge, now delivered the opinion of the court. The objections urged against the motion are, 1st. That Strang having been convicted of an infamous crime, is an incompetent witness. 2d. That if competent, he ought not to be admitted to testify, inasmuch as being an accomplice with the prisoner, he is admissible only from necessity or policy, at the discretion of the court, and would, if he testified, be entitled to a pardon.

1. The disability of Strang to give testimony is urged, in the first place, on the ground of the legal infamy resulting from his conviction. This infamy was formerly held to arise from two sources, a conviction of certain offences, and the infliction of certain penalties. The mere conviction, properly evidenced, of some crimes, was always sufficient, as it is at present, to render the offender infamous; whilst some penalties of a personally degrading character had also the same effect, whatever the crimes might be for which they were inflicted. But it is now settled, on better principles, that it is the crime, and not the punishment, which creates the infamy and destroys the competency of the witness. [1] (Co. Lit. 6 a. & b. 2. Hale, 277. Com. Dig. Testmoisne 5 Bull. N. P. 291. 1 Leach, 442. Peake's Ev. 149. Bac. Abr. Ev. A. 6. Willes, 666. 2 Wils. 18. 2 Salk. 690.)

[1] Arch. Crim. Prac. by Waterman, 155. N. 1. A person convicted of an infamous, in one State, was held incompetent as a witness in another, under the Constitution of the United States, and the act of Congress declaring the effect of the records of one State in every other. *State v. Candler*, 3 Hawks, 393. *State v. Ridgley*, 2 Haw. & Mc. H. 120. *Clarks Leese v. Hall*, *id.* 378. *Coles Leese v. Cole*, 1 Haw. & I. 378. But it should appear that the foreign offence would disqualify at common law or by some statute of the country. 2 Haw. & Mc. H. Supra. A different doctrine prevails in Massachusetts. See 1 Cowen & Hill's Notes to Phil. Ev. 10.

At the present day, therefore, a conviction of treason, or felony, or of any species of the *crimen falsi*, will incapacitate the party convicted from giving evidence while it continues in force, without regard to the punishment inflicted. (Hawkins, b. 2, c. 46. 1 Phil. Ev. 16. 1 Chitty's Crim. Law, 600, and authorities there cited.)

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In order, however, to urge the disability with effect, it is necessary to prove the record of the judgment as well as of the conviction. [1] The sentence, says Chitty, must be produced as well as the conviction, lest any objection should have defeated it on arrest of this judgment. And the admission of the *witness himself will not suffice, without a copy both of the judgment and the conviction. [2] In these positions, the other most approved modern elementary writers, Philips and Starkie, concur with Chitty, and they are abundantly supported by the authorities to which they severally refer. (1 Phil. Ev. 26. 2 Starkie, 716. 1 Cowp. 8. 4 Bur. 2283. 8 East, 77. 11 East, 309.)

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So that Strang's competency as a witness is not affected by his conviction merely; neither will it be destroyed, unless that conviction be followed up by judgment. [3] Nor will the circumstance of his being an accomplice with the prisoner, as the principal felon in that murder to which she is charged as accessory, vary the general rule in its application to this particular case.

The evidence of accomplices has at all times been admitted either from a principle of public policy, or from judicial necessity, or from both. [4] They are no doubt requisite as witnesses in particular cases; but it has been well observed that in a regular system of administrative justice, they are liable to great objections. "The law," says one of the ablest and most useful modern writers upon

[1] *Castellano v. Peillon*, 2 Mart. Low. R. 466. *Skinner v. Perot*, 1 Ashm. 57.

[2] *Orr's case*. 5 City Hall, Rec. 181. See also 1 Cowen & Hill's Notes to Phil. Ev. 11, and authorities there cited, 1 Phil. Ev. 28.

[3] 1 Cowen & Hill's Notes to Phil. Ev. 10.

[4] *Byrd v. The Commonwealth*, 2 Ver. Cas. 490. *M'Niff's Case*, 1 C. H. Rec. 8, U. S. v. Henny, 4 Wash. C. C. 428.

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criminal jurisprudence, "confesses its weakness, by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." (Chitty's Crim. Law, 82, 608, 769. Cowp. 334, 6. 1 Leach, 118, 120.) The general rule is, that a person who confesses himself guilty of a crime, is a competent witness against his partners in guilt; and on the trial of an accessory for a misdemeanor in receiving stolen goods under the statute, the principal felon is a competent witness; the statute enacting that the accessory may be proceeded against, although the principal felon has not been convicted, and whether he be or be not amenable to justice. (1 Leach, 467. 2 East's P. C. 782.) So, under another clause of the same statute, we have held "in the case at bar, that the accessory may be proceeded against, although the principal have not been sentenced; the statute enacting that if the principal felon be convicted, the accessory may be proceeded against in the same manner as if such principal felon had been attainted. (1 R. L. N. Y. 496.)[1]

In cases of felony, therefore, the principal is a competent witness against the accessory; and instances have occurred in this state, in which they have been admitted. I allude particularly to the cases referred to, of Jack Hodges, a negro, which occurred in the year 1819, before the late Mr. Justice Van Ness, at a special oyer and terminer for the county of Orange, and which I shall hereafter have occasion to state more at large. But in what manner, and under what circumstances, are accomplices admitted as witnesses against their associates? This inquiry brings me to the consideration of the second objection urged by the counsel for the prisoner, viz.

2. That Strang, if competent, is only admissible at the

[1] Revised Statutes, 4th ed. 911, § 49.

discretion of the court, and would, if he testified the truth, be entitled to a pardon.

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The practice of admitting accomplices to give evidence against their associates, was adopted from analogy to the old law of *approvement*; [1] which was, when a prisoner, arraigned on a capital charge, confessed the fact before he pleaded, and accused his coadjutors of the same offence. He must have been indicted, and in custody, and have desired to accuse his accomplices; and must likewise have discovered upon oath, not only the particular offence for which he was indicted, but, all treasons and felonies which he knew of; and after all this, it was *at the discretion of the court* to assign him a coroner, and admit him as an approver or not. For if upon the trial of the appeal it appeared that he was a principal, and tempted the others, the court might reject him. When admitted, it must have appeared that what he discovered was true, and that he had discovered the whole truth, and if on the trial, the party accused was acquitted, judgment of death passed against the approver upon his own confession of the indictment. (Cowp. 335, Leach, 118.)

*The allowing of approvements, which was at all times in the discretion of the court, was, from the mischiefs and inconveniences attending it, at length superseded by the modern practice of admitting accomplices to give evidence under an implied promise of pardon, on condition of their making a full and fair confession of the whole truth; that is, of all the offences about which they might be questioned, and of all their associates in guilt.

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This implied promise arises from the consideration, that the witness, who is not bound to criminate himself, does so in order to discover greater offenders; and upon performance of the condition to the satisfaction of the court, he acquires an equitable title to a pardon. The practice in England is, where the accomplice is in custody, for the counsel for the prosecution to move that the accomplice be taken before the grand jury, pledging his own opinion after

[1] 1 Phil. Ev. 28. note 2. Sir P. Crosby's case. 1 Hal. P. C. 803.

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a perusal of the facts of the case, that his testimony is essential. If, however, an accomplice be taken before the grand jury by means of a surreptitious order, the indictment will still be valid, as it seems to be a general rule, that the means by which evidence was obtained will be no objection to the evidence itself. And in the case of the *King v. Lee*, (Northamp. Ass. 1818,) where the question was, whether the accomplice who had been taken before the grand jury could legally be convicted, the judges were of opinion that he might, but some doubted. (Leach's L. 184. 2 Starke on Evid. 22, 3.)

It is not, however, a matter of course to admit an offender as a witness on the trial of his accomplices; not even after he has been so allowed by the committing magistrate, or examined by the grand jury; but a motion for this purpose must be made by the counsel for the prosecution; and the court, under all the circumstances of the case, will either admit or disallow such evidence as may most effectually answer the purposes of justice. (Per Buller, Just. Maidst. Ass. 1798. Cr. Cir. Comp. 51. 1 Phil. Evid. 30, 33.)

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So long as, by the policy of the law, accomplices are deemed competent witnesses against their fellows, so long must a discretion in regard to admitting them be vested somewhere or other in the government. It could not consistently with the nature of the power, or the course and character of judicial proceedings, be committed to the chief executive magistrate; nor could it with propriety, be entrusted to the public prosecutor, or any other inferior ministerial officer of justice, because, strictly speaking, it is the exercise of a high *judicial* discretion, and the reasons for vesting it in the court, rather than in the committing magistrate or even the public prosecutor, is, that the admission of the party as a witness amounts to a promise by the court of a recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime. In the case of the *King v. Rudd*, reported in Cowper, 331, the prisoner had been admitted by the police magistrate of London, as a general witness for the

crown, in the character of an accomplice against her associates as to all forgeries; and confessed that she had, on compulsion, signed one of three bonds suspected to have been forged by her coadjutors, the Perreaus, and denied having any knowledge or concern in regard to the other two bonds. But it appeared on the trial of Robert Perreau, that the prisoner had confessed herself guilty of forging one of these bonds also, and that her associate was innocent. Upon this she was committed to answer the forgery, and having obtained a *habeas corpus*, she applied to the court of king's bench to be admitted to bail; but she was refused upon the ground that *she had not made a full and fair disclosure of all she knew*.

Lord Mansfield, in delivering the opinion of the court on that occasion, expressly declared that if she had come under circumstances sufficient to warrant the court in saying that she had a title of recommendation to mercy, they would bail her for the purpose of giving her an opportunity of applying for pardon; and his lordship referred with approbation to a case of an accomplice, upon trial before Mr. Justice Gould, the circumstances of which he stated as follows: "An accomplice made a fair and full discovery to the satisfaction of Mr. J. Gould, who tried the other offenders; the other witnesses who were called upon the trial, proved the identity of the accomplice by the description of his person, but failed *as to the identity of the other offenders*; and the jury, because they doubted as to the guilt of the others, acquitted them. The counsel on the part of the prosecution then contended that the accomplice ought to be tried; but Mr. Justice Gould, under the circumstances of the case, was of a contrary opinion;" that is, he held, *that the accomplice, having performed the conditions on which he was admitted as a witness, although he had failed to produce the conviction of his associates was nevertheless entitled to a recommendation for pardon*; and he so ruled, as Lord Mansfield thought, "*very rightly*." [1]

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[1] In Hall's case, 1 C. H. Rec. 57, 59, it was said, a conviction may follow, though the testimony of the accomplice stands uncorroborated. *Quere*. And See U. S. v. Tom Jones, 2 Wheeler's Crim. Cas. 451 to 461

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The principle deducible from the cases undoubtedly is, that an accomplice, although a competent witness against the associates and partners of his guilt, is nevertheless only admissible from reason of judicial necessity and policy, and in furtherance of the essential ends of public justice. And the question always addresses itself to the discretion of the court; not to their judgment as to the general competency of the witness, but to their sound legal discretion, whether, upon a sound consideration of the facts and circumstances of the case, he shall be permitted to testify under an implied promise of pardon; which vests in him an equitable title thereto, if he speaks the truth.

That there have been cases in which accomplices have been thus admitted, is not denied; and that of the negro Jack, already mentioned as one of them. Jack had been convicted as a principal felon in the murder of one Richard Jennings, and before sentence, was called as a witness for the people on the trial of David Conkling, as an accessory before the fact of the same murder. No question arose as to his competency, nor does it distinctly appear from the printed report of the trial, that any motion was made on the one side, or objection on the other, as to the character and circumstances under which he was called to testify. He seems to have been admitted by universal consent, and it was even proposed by the counsel for the prisoner that he should be examined without oath; but the learned judge who presided at the trial, directed him to be sworn, and admonished him that he should not expect or hope for pardon, though he should disclose all that he knew. But whether he were *permitted to testify by consent of all parties, or at the discretion of the court alone, is not material; he testified at all events in the character of an accomplice,

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Although the same rule is recognized in England, it has been so much mitigated in the practice, it may now be said, that unless the testimony of an accomplice is corroborated, in some material part by unimpeachable evidence, the judge should advise the jury to acquit the prisoner, and if he should neglect so to advise the jury, or the jury disregard such advice, and a conviction followed, the conviction would be in either case at variance with the authorities, and be regarded as illegal. See 1 PHA. EX 30, et seq.

and it is very clear from the circumstances of the case that he was properly admitted. They were these : David Conkling and James Teed, who were both accessories before the fact in the murder of Richard Jennings, were brothers in law. Teed was the nephew of the deceased, and Conkling had married the sister of Teed. They had a controversy with Jennings respecting some land in which the latter prevailed ; and hence an animosity arose between the parties which eventuated in the murder of the uncle. To effect this, Jack, who was the servant of Conkling, was used as an instrument. He was ignorant and brutified, both from his condition and his habits. Having been supplied with liquor, to which he was addicted, and bribed by the promise of a large sum of money, and a safe conveyance out of the country beyond the pursuit of justice, he undertook and partially accomplished the work proposed to him by his master ; and having shot the deceased without mortally wounding him, and having been present when Jennings was dispatched with a club by one Dunning, another of his associates, he was technically a principal in the murder, and as such was he indicted, tried and convicted ; whilst Conkling, who, together with Teed, was a chief contriver and instigator of the whole affair, and directly interested in the destruction of Jennings, was technically an accessory : but the negro had not much more moral agency in the transaction than the musket in his hand ; and his moral guilt, in comparison with that of his master, was scarcely greater. Under such circumstances he was called and admitted as a witness ; and on his testimony, corroborated by other evidence, was Conkling as well as Teed and Dunning convicted. The two latter were executed ; the punishment of Conkling was commuted, by special act of the legislature, to imprisonment for life, and Jack was pardoned on the like condition. (L. N. Y. sess. 42, ch. 51.)

The facts of this case are more familiar to me from happening to have had the honor of a seat in the assembly at the time the bill for Jack's pardon was pending in that house ; and although Conkling was, upon the recommendation of the judge, eventually included in it, yet Jack had been previ-

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ously recommended as entitled to pardon, both by the able and experienced judge who presided at the trial, and by the eminent counsel who conducted the prosecution.* The bill was framed in reference to Jack's peculiar claim, the first section containing an absolute pardon, and the second providing specially for his confinement in the state prison during life; and I well remember that when it was objected that the judge had told him that he must not expect or hope for pardon, urging, in answer to it, and placing my vote for the bill distinctly on the ground that it was not in the power of the court to limit the operation of the law; and that the person convicted having performed the condition on which the implied promise arose on the part of the government, was entitled to a pardon. And this doctrine we unanimously believe to be the established law of the land. It remains, therefore, only to apply it to the case at bar.

The motion now made, being thus addressed to our discretion, is to be regarded in the same light as if, instead of it, the public prosecutor had moved the court to suspend sentence upon Strang, that he might be admitted as a witness against the prisoner. And it is so to be regarded, because his competency after conviction rests on the possibility of the judgment against him being arrested, and the present conviction set aside for irregularity or error. It is moreover to be considered as if Strang had already been admitted as a witness, had testified for the people on the present trial, in the character of an accomplice, had told the whole truth to the satisfaction of the court, and by himself or his counsel now claimed of us to suspend the sentence of the law, and recommend him for pardon. And it is so to be considered, because the law presumes that if admitted to testify, he will speak the truth. Now upon what principle of good faith, public morality, sound policy, substantial justice, equitable right, or strict law, could we deny this claim? Suppose him admitted to testify against the prisoner, and she acquitted or condemned, and the record of

* M. Van Buren, S. B. Betts, and John Duer, Esqrs.

his own trial to be removed, *by writ of certiorari to the supreme court, and the conviction against him there to be quashed for error or irregularity in the proceedings; suppose a new trial granted to him on the ground, say, of the improper admission of his confessions to the gaoler; or if this be not ground of exception, as not appearing on the face of the record, suppose the proceedings set aside upon some other good and sufficient cause, and upon the new trial the court should be of opinion against admitting those confessions, and the district attorney should then offer evidence of his confessions made whilst testifying as a witness against the prisoner; would not the counsel of Strang insist that they could not be given in evidence, without a violation of public faith and justice, as he had been induced to waive the protection of the law, and criminate himself only as the consideration or condition of an implied promise of recommendation to pardon from the court, and the equitable claim thence resulting to the mercy of the executive? Would not the court reject the evidence of such confessions? Could they be admitted consistently with the letter or spirit of any rule by which the confessions of a party are admissible against him; or consistently with our oaths to administer justice impartially according to law? We think not.

It may be objected, however, that in a case like the present, there can be no certain assurance of a pardon; inasmuch as the power of granting pardons is vested by the constitution solely in the governor; and that the authority of the court extending no farther than the recommendation, it must after all rest with the executive, whether that recommendation be complied with or not. This is indeed true; but it by no means follows that where an implied pledge results from the conduct or proceedings of a co-ordinate department of the government, or is given even by its subordinate agents, acting in good faith within the scope of their authority, it will not be sanctioned by the executive. On the contrary, the legal presumption is, that the public faith will be preserved inviolate, the law respected, and an equitable claim founded upon both, ratified and allowed

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Could a different supposition be for a moment tolerated, this court would nevertheless *be bound most scrupulously to discharge its own obligations as far as they extend, and as far as we have power. And if an accomplice perform the condition on which he is admitted as a witness for the people, according to its spirit, we hold ourselves bound in duty and in conscience, to redeem the promises which the law raises in his favor, to the very letter. When we have done this we have performed our duty, and are no further responsible for the consequences. If we are correct in these principles, the question as to the admission of Strang, is reduced to the simple inquiry, whether, in the sound exercise of the discretion vested in us, we believe that it would promote the ends of public justice to admit him as a witness on this trial, and thereby entitle him, if he speak the truth, to impunity, in the event even of the prisoner's acquittal?

It has already been observed, that we are bound to presume that if admitted, he will speak the truth; and we are bound to presume farther that the counsel for the prosecution believe that he will do so, or else certainly they would not have called him. We are therefore to determine whether, in the exercise of our judicial discretion, we ought, under the circumstances attending this murder, as developed on the trial of Strang himself, as well as on this trial, to promise our recommendation for pardon upon the chance of procuring the conviction of the prisoner at the bar. Let us examine the circumstances of this case in reference to the character and conduct of the respective parties, to enable us the better to decide this question.

From the evidence before the court, it appears that Strang is the son of a respectable farmer in the county of Dutchess, from whence he has been absent some time, and is now about thirty years of age, with an experience of the world and knowledge of mankind not usually acquired even at that age. That he is married and has deserted his wife. That he is naturally ingenious, shrewd, cunning, cool, resolute and bold. Not deficient in the information and acquirements usual among persons of his condition, but rather superior to those who have enjoyed no greater advantages.

He entered the family of Mr. Van Rensselaer, where the deceased and his wife boarded, about twelve months ago, under the feigned name of Joseph Orton, and represented himself as a single man. In this character, he seduced the affections of the prisoner and won her at all events to the gratification of his lust, if he did not render her subservient to his more guilty and treacherous purposes. By his own confession, he meditated the murder of Mr. Whipple for the space of six months before its perpetration. It is proved that the prisoner had considerable landed estate in her own right, and has but one child, a boy of about eight years old, to inherit it; and that Strang expressed a determination to have her if it cost him his life, and proposed to take her off with him to Canada. He not only contrived but executed this plan in its most fatal part, and but for his detection might have succeeded in the whole of his bloody plot. Whether she furnished the money knowingly or not, he bought the rifle; he watched the opportunity, seized it with promptness, and availed himself of it with adroitness, deliberation and coolness; and he shot the man. In short, he appears before us, not merely as the *technical*, but as the *real* principal in this foul transaction; nor as the instrument of the prisoner to get rid of the only obstacle to her guilty pleasures and treacherous designs; but as the betrayer of her virtue and honor, and the destroyer of her husband, in order to obtain possession of her property.

Whilst on the other hand, she appears to have been married to the deceased at a very early age, entirely in pursuance of her own inclinations. She is not now more advanced than her twenty-sixth year; possessed of beauty and fortune, though without much education, and most lamentably defective in principle. Vain, weak, frivolous, wanton and inconstant in character; and in conduct, imprudent, silly, lewd, presumptuous, treacherous, and guilty to a certain extent in the eye of the law; she was a fit instrument in the hands of an artful and designing villain; but destitute of those qualities which could have swayed the mind or controlled the actions of a man like Strang, or of any other with whom she might have had illicit intercourse

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Had the case *been reversed, and she presented not only as a woman destitute of principle and profligate in manners, but of greater experience, more strength of mind and energy of character, ill treated by her husband, or from her own or his defects of temper or conduct, living unhappily with him; cherishing the wish, and expressing the determination to get rid of him; had such a woman selected for her paramour a youth of inexperience, and by the seduction of her person and her fortune, led him to commit the murder; had the intelligence and temptation been hers, the weakness and the folly his; the court would not have hesitated to have admitted him as a witness for the people, and on his full and fair disclosure of the facts, to have recommended him, as we must then have done, to mercy.

But as the matter stands before us, we have as little hesitation in rejecting his testimony as an accomplice, for we could never consent to recommend him for pardon. The prisoner may be guilty, to the full extent of the indictment; she is nevertheless to be presumed innocent until the contrary be shown beyond reasonable doubt. But her accomplice has already been convicted, and now awaits his sentence; we know the full extent of his guilt, and know from the nature of things she cannot be more guilty than he is, if every thing charged be proved against her. Why then should we select her for punishment in preference to him? Neither her age, her sex, the circumstances of the case, the essential purposes of justice, or the moral sense of mankind, would justify it. But suppose her innocent; suppose the insinuations against her in Strang's confession to be groundless; and every thing that he may have sworn to before the grand jury, who found the bill against the prisoner at the bar, equally unfounded; and even with Strang's testimony she should be acquitted at the trial; yet if the court believed he spoke the truth, and he should insist upon his claim to our recommendation, it would be difficult to resist it, because it would be difficult to determine whether the verdict of the jury was rendered upon an absolute disbelief of the charge, or from the jury's refusing credit to the uncorroborated testimony of the accomplice;

and thus might he, the only guilty *party, escape punishment by the success of a deep laid artifice for procuring his admission as a witness. Or suppose her guilty, but acquitted, not from a disbelief of Strang's story, but from a proper caution in the jury in not giving it implicit credit when uncorroborated by other proof, or from his being discredited on other legal grounds, extraneous to the transaction; yet would the court be bound to suspend the sentence, and recommend him for mercy, and thus, though the prisoner and himself might both be guilty, yet neither would be punished. To avoid all risk of this sort, and to prevent the hazard even of Strang's escape, from the mere chance of convicting the prisoner, we should deem it, upon the whole, discreet to exclude the testimony, even had we less doubt in regard to the question we have discussed, than we profess to entertain. For the prisoner is entitled to the benefit of every doubt upon points of law, as well as upon questions of fact. But we are satisfied, both upon principle and authority, that Strang, standing before us, convicted as an accomplice with the prisoner, can only be admitted to testify against her at the discretion of the court; and from the facts and circumstances of the case, we are as clear that it would be an improper exercise of that discretion to admit him, and consequently that the motion to that effect must be denied.

We are aware of the responsibility thrown on us upon this occasion. But this court shrinks from no responsibility cast upon it by the law. Were we to do so in this case, we should be knowingly guilty of a dereliction of duty, and thereby violate our oaths. We are aware, too, of the prejudice and excitement which this trial has produced, and which has in some measure manifested itself in the course of the proceedings. But we are bound to resist prejudice, and to oppose the shield of the law for the protection of the weak, and repress the influence and operation of human passions against those who are accused before us. Neither the voice of prejudice, nor the tumult of excitement, must be heard within these walls. We sit here as in the temple of justice, and in our administration at her altar, we

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look not for the applause of men, but seek the favor and acceptance of the *Deity. Next to the approval of God and our consciences we are emulous of the esteem of the wise and good ; and fallible as we are, we are unconscious on this occasion of being influenced by any other motive than that of faithfully, impartially and firmly administering the law ; and if we have erred in the conclusion at which we have arrived, we shall at least have the consolation of knowing that we have erred on the side of mercy. (a)

Motion denied.

(a) Though where an accomplice, admitted on motion, as a witness, is, if he conduct himself with propriety, and tell the truth, entitled to a recommendation by the court for a pardon ; yet he may be prosecuted, convicted, and sentenced for any crime other than the one concerning which he is received to testify. Thus, where the accomplice was received at the assizes, as a witness on a trial for robbery, he was prosecuted and convicted at the same assizes for burglary ; and held well : the 12 judges on consultation, holding that, in such case, it rested in the discretion of the judge whether he would recommend the witness to mercy. (Rex v. Lee, Russ. & Ry. Cr. Cas. 361.) So where the king's evidence, in a case of burglary, turned out at the assizes to be unworthy of credit, and he was, at the same assizes, convicted of sheep-stealing, and sentenced, but the sentence respited by the judge for the opinion of the 12 judges, they held the conviction right, saying, the carrying the sentence into effect, they thought, was a question entirely for the discretion of the judge of assize. (Rex v. Brunton, Russ. & Ry. Cr. Cas. 464.) So the judges will not, in general, admit an accomplice as king's evidence, though applied to for that purpose, in the usual way, by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a witness. Resolved in several cases, (2 Carrington & Payne, 411.)

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WALWORTH, Circuit Judge. The defendant Pierce was indebted to the complainants, severally, in sums amounting in the whole to about \$2,500. For the recovery of these demands, the complainants, in August, 1825, commenced suits thereon; and obtained judgments in February thereafter. During the pendency of these suits, all the visible property of Pierce was levied upon by executions issued on judgments confessed in favor of, or obtained by other creditors; and the executions on the complainants' judgments have been returned wholly unsatisfied. During the pendency of the complainants' suit, Pierce loaned to the defendants, Elliott and Archibald, between eleven and twelve hundred dollars, for three years, and sold to them a small quantity of ribbons, amounting to \$25.50. Pierce was insolvent at the time of this loan; and the complainants allege that these funds were put into the hands of Elliott and Archibald, to keep the same beyond the reach of his creditors; and have filed their bill to have the funds in question applied to the satisfaction of their judgments. The cause is brought to hearing on bill and answer; and the questions presented for the consideration of this court are, First, whether, under the circumstances of the case, as disclosed in the answers, the complainants have any equitable claim upon the fund in question; (1) and secondly whether the prior judgment creditors are entitled to a preference, and ought to have been made parties to this suit.

The general principles of equitable jurisdiction, in relation to property of debtors in the hands of third persons, have been so recently and so ably examined and discussed, both in chancery and in the court of errors in this state, that it would be useless for me to go over the whole ground;

A creditor having obtained judgment, and procured his *fi. fa.* to be returned unsatisfied, may file his bill against a debtor of the defendant, to whom he has loaned moneys or sold goods on credit for the purpose of keeping the fund out of the reach of his (the defendant's) creditors; as chancery will divert the payment from the defendant to his creditor so filing his bill. If the creditors to whom the defendant loaned or sold are privy to the fraud, they may be compelled to pay immediately, though their debt was contracted on a credit; but if not privy to the fraud they may be compelled to pay the debt to the execution creditor at the expiration of the credit.

judgment creditors of the defendant, holding different judgments, they need not be parties.

The issuing and return of a *fi. fa.* does not give a lien on the fund; but the filing of the bill, or doing some other decisive act showing an intention to pursue the fund.

(1) Vid. 2 R. S. 173, 4.

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and *I shall not attempt it. I shall content myself with endeavoring to apply the doctrine there established, to the particular circumstances of the case now under consideration.

The case of *Hadden v. Spader*, in the court of errors, (20 John. 554,) establishes the broad principle, that courts of equity have power to reach the property of a debtor which has been placed in the hands of a third person; and to cause the same to be applied in payment of the demands of judgment creditors, who are unable to obtain satisfaction thereof by the ordinary process of courts of common law; and that it makes no difference that such property was put out of the reach of the creditors before their judgments were obtained. The opinion of Judge Woodworth, which appears to have been adopted by the late Chief Justice Spencer and a majority of the court of errors, in that case, carries the doctrine so far as to embrace *choses in action* and public stocks belonging to the defendant. And certainly the case of *Taylor v. Jones*, (2 Atkyn's Rep. 600,) referred to in that opinion, and *Edgell v. Haywood*, (3 Atkyn's 352,) which appears to have been overlooked by the counsel in that case, are authorities for saying, that property, not in itself liable to execution, if placed or left in the hands of third persons, to the injury of the creditor, may be reached through the medium of a court of equity. (See also 2 Kent's Commentaries, 358.)

But it is supposed by the defendants' counsel that the doctrine of *Hadden v. Spader*, as laid down in the opinion of Judge Woodworth, has been very much narrowed by the decision of the late chancellor, in *Donovan v. Finn*, (1 Hopk. Rep. 59.) If there is any thing in that decision which conflicts with the opinion of the court of errors in the former case, I am bound to support the decision of the court of errors, it being the judgment of a court of dernier resort, to the adjudications of which all other courts in this state are bound to submit. It must be admitted that the reasoning of Judge Woodworth would extend the jurisdiction of courts of equity much beyond what the late chancellor supposed was allowable; while, on the other hand, the

reasoning of chancellor Sanford would, undoubtedly, restrict the jurisdiction *of those courts within much too narrow limits. I think, with the late chancellor, that in an ordinary case, free from all fraud and injustice, this court ought not, on the application of an execution creditor, to deprive the debtor of the power of collecting his debts. There must, undoubtedly, be an unconscientious exercise of that power, on the part of the debtor; or some fraud, collusion, injustice, or wilful neglect on his part, to collect and apply his debts and choses in action to satisfy his creditors; or some other ground of equitable jurisdiction in relation to such debts or choses in action, to enable execution creditors, by the aid of a court of equity, to reach and apply the same in satisfaction of their judgments and executions. In the case of *Donovan v. Finn*, it is manifest the chancellor considered the legacy, to Finn, merely as an ordinary debt due from the executors. It does not appear that any fraud or collusion between him and the executors was admitted by the answer, or established by the testimony in that cause. It was a mere neglect on the part of Finn to collect the legacy left him by his brother; perhaps for the reason, suggested by his counsel, that he was unable to give the requisite security to the executors to indemnify them against the contingent claim alluded to in the answer. But I apprehend there was a sufficient ground of equitable jurisdiction in that case, not alluded to by the chancellor. The executors were trustees, in relation to whom the court of chancery had general jurisdiction, and the recovery of the legacy was a part of the ordinary jurisdiction of that court. (*Edgell v. Haywood*, 3 Atk. 352.) Again; the fact that a legatee was not able to procure the requisite security to indemnify the executors, would, of itself, form a strong ground for allowing the execution creditors to do it for him; so that the legacy might be collected and applied to the payment of his honest debts.

Every person should be permitted to exercise the most liberal and extended discretion as to the time and manner of disposing of his property, vesting the proceeds thereof, and of collecting his debts; provided he exercises that

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discretion fairly and honestly in reference to the equitable right of his creditors, to be paid out of the same; and without any view or intention of delaying, hindering or preventing them from obtaining *their lawful dues and demands. But wherever he exceeds these limits of his legitimate authority and power over his property and funds; wherever there is reason to believe he has exercised that power with intent to delay, hinder, or defraud those who have a claim upon that property and those funds, for the satisfaction of their just demands, such exercise of power becomes unconscientious and inequitable; and a court of equity will then control and regulate its exercise in such a manner as to compel him to do justice to its creditors. (Per Savage, Ch. J., 5 Cowen, 580.) Such an unconscientious exercise of power, by the debtor, is considered a fraud upon his creditor. And where such a fraud has been actually committed by a debtor; where he has intentionally placed, or even left that property which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to elude the justice of the law, and this court, by its ordinary course of proceedings, can reach such property without doing injustice to any, it does not deserve the name of a court of equity if it has not jurisdiction to afford relief to the injured creditors.

From the facts disclosed in the answer of the defendants, I am perfectly satisfied that Pierce intended to put the money which he loaned to Elliott and Archibald, in a situation where he could have the use and benefit thereof, and still keep it beyond the reach of his creditors. At the time he loaned this large sum of money to them, for three years he knew he was insolvent. It was after the complainants had commenced suits against him at law for the recovery of their debts; he had suffered the whole of his visible property, which cost him between five and six thousand dollars, to be sold under the executions of favored creditors, for less than one fourth of its cost; when he had in his hands, or probably could have raised, upon Gates' bill of exchange, from \$1,500 to \$2,000; and he had removed with his family to Ogdensburgh, for the pur-

pose of being within the gaol limits. He loaned the money to be invested in a store of goods ; the interest was to be paid to him annually ; and he was employed as the clerk in the store, at a salary of two hundred and forty dollars a year, and the use of a dwelling house for himself and family. From these facts can there be any doubt of his intention to put his funds beyond the reach of the executions of his creditors, while he secured an annual income therefrom, for the benefit of himself and family ? . .

But it is insisted that Elliott and Archibald were *bona fide* borrowers of the money, without any knowledge of the fraudulent intentions of Pierce, and that for this reason the complainants' bill cannot be sustained against them. They do indeed deny that they had any knowledge of the concerns of Pierce at the time they received the money ; and they also swear they were not informed as to the extent of his debts or his means of payment, and did not then know that he was insolvent. There being no replication, these allegations, in their answer, must be taken as true, if they are not contradicted by other facts admitted by them in such answer. They admit that at the time they received the money, they knew that Pierce had broken up his establishment where he had been trading at Rossie, and had removed with his family within the gaol limits of Ogdensburgh ; they knew that suits had been brought against them by the United States for heavy penalties, for alleged violations of the revenue laws ; they knew that all his visible property, with the exception of his household furniture, had been sold on the executions of some of his creditors ; and that suits were also pending against him for debts due to others. This certainly was sufficient to put them on inquiry ; and, if the cause depended on this question alone, I am not prepared to say that I should consider them *bona fide* holders of this money. With all these facts before them at the time they dealt with Pierce, and other facts which must have been within their knowledge, if they made no inquiries as to his concerns, and as to his ability to pay his debts without the aid of these funds, that circumstance, of itself, is certainly calculated to throw great suspicion up-

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4th CIRCUIT, on the transaction. It looks very much like wilful and intentional ignorance, which is a very common badge of fraud.

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In the view I have taken of this case, it is not very material to inquire whether Elliott and Archibald were or were not conscious of the fraudulent intentions of Pierce. The whole amount is still in their hands : and they have no equitable claim upon any part thereof. If the transaction was only fraudulent on the part of Pierce, and Elliott and Archibald had no knowledge of the intended fraud, and are *bona fide* holders of the fund, they must still, in equity, be considered trustees for the benefit of the execution creditors. And surely there cannot be any hardship or injustice in requiring them to pay the money to those creditors, at the times and in the manner they have agreed to pay the same to Pierce. (Per Woodworth, J., 20 John. Rep. 570.) Justice and equity certainly require the protection of innocent holders of property, which has been fraudulently transferred to them, or placed in their hands by the fraudulent debtor, without any notice of his intention, and without fault on their part. But a court of equity will never permit a shield which is properly interposed for the protection of a *bona fide* holder of the fund, to be improperly used for the benefit of the fraudulent debtor. If a fraudulent debtor sells his property to a *bona fide* purchaser, who has no notice of the fraudulent intent, he will be permitted to hold the property ; but if any part of the purchase money remains unpaid, he will be considered in equity as holding such unpaid purchase money for the benefit of those who have been defrauded by the sale. (Jewitt v. Palmer, 7 John. Ch. Rep. 65.)

It is also objected that there are other judgment creditors who had sued out executions prior to the executions of the complainants, and who are entitled to a preference ; and that they should have been made parties. And the case of McDermutt and others v. Strong, (4 John. Ch. Rep. 687,) is relied upon to support that objection.

It is a sufficient answer to this objection, that it does not appear that the prior executions have been returned unsa-

tified, or that the property levied on was not sufficient to pay them. The household furniture of Pierce was levied on by those executions, but, as appears by his answer, it was not sold; and the value of it is not stated. For aught that appears, it might have been sufficient to satisfy the balance due on those executions. At all events, if these favored creditors have chosen, without a sale, to abandon any part of the tangible *property of the debtor, which they had seized under their executions, neither law nor justice will permit them to resort to the equitable fund, claimed in this suit, to the exclusion of the complainants. It does not, therefore, appear by the pleadings in this case, that there are any creditors, except the complainants, who are in a situation to come into this court to obtain payment out of this fund. But I apprehend the principle contended for by the defendants is not correct, even if it did appear in this case that the prior executions had been returned unsatisfied. In the case of *McDermutt and others v. Strong*, after the plaintiffs had proceeded to judgment and execution at law, and the sheriff had returned that he could not raise the money thereon, they filed their bill in chancery, to have their debts satisfied out of the fund in the hands of the trustee; and their suit in chancery had actually been pending several months before the debtor was discharged under the insolvent act, and made the assignment to the defendants, under which they claimed the trust fund, for the benefit of the creditors of the insolvent, generally. The complainants in that case had also given previous notice to the trustee that they intended to look to the trust fund to satisfy their judgments. And the chancellor, under those circumstances, very justly decided that the complainants, by their legal diligence, had acquired a specific lien upon the fund, and which entitled him to a preference. It is evident from the report of that case, that the chancellor did not consider the issuing of the execution, merely, as giving any priority; for the execution of one of the plaintiffs was issued in May, and that of the others in June, and yet the decree directs that, if the fund is not sufficient to satisfy both judgments, it shall be distributed among the

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Where the property has not been levied on by the execution, or where it is of such a nature that it never could have been levied upon, or reached by an execution at law, the return of the execution unsatisfied, will not, of itself, give the creditor a specific lien upon the trust property, or *choses in action* of the debtor. He must follow up his execution by the commencement of a suit in equity, or, at least, must give notice of his claim, and of his intention to pursue the trust fund; or do some decisive act, showing such intent, before he can be considered as having a specific lien. The creditors whose legal diligence has continued to pursue the property of the defendant into this court, are entitled to a preference as the reward of their vigilance. In *Edgell v. Haywood*, Lord Chancellor Hardwicke says, "The court does not proceed, in this case, on the ground of a specific lien, but only considers it a part of the property of the debtor, which the creditor cannot come at without the aid of this court. If, therefore, after judgment, or even after the *fiery facias*, the debtor had assigned this *bona fide*, and for a valuable consideration, and without notice, it would be good, and prevail against this creditor. But after a bill brought, and a *lis pendens* created as to this thing, such assignment could not prevail." (3 Atk. 357.) So in *Spader v. Davis*, (5 John. Ch. Rep. 280,) even the holder of the fund, under an assignment which was fraudulent in law, was only held accountable for so much thereof as remained in his hands at the time of the commencement of the suit in chancery. And certainly there can be no more injustice in considering the commencement of the first suit in equity, by an execution creditor, as giving him a preference there than there is in giving a preference to the creditor who has obtained a specific lien upon the property of his debtor, by a prior seizure on his execution at law. If the creditor whose execution is first returned unsatisfied, pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the

way before he has obtained a specific lien, he has no right to complain that the plaintiff, in a subsequent execution, has gained a preference by superior vigilance. And where, as in this case, the creditor in the prior execution makes no claim upon the equitable fund, surely the fraudulent debtor, or the trustees who have no interest in the question, should not be permitted to make such an objection.

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I shall therefore decree, that Elliott and Archibald pay to the complainants the amount of the note given by them to Pierce, together with the interest thereon, at the times and in the manner prescribed therein for such payments; and also pay to the complainants the sum of \$25 50, due for the ribbons received of Pierce, and the whole to be applied towards the satisfaction of the judgments of the respective complainants, ratably; first retaining out of the same their costs of this suit, to be taxed. And under the particular circumstances of this case, Elliott and Archibald will not be charged with the costs of the complainants, or permitted to retain their own costs out of the trust fund.

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Decree accordingly. (a)

(a) For a further examination of this question in the English courts, and a review of the case of *Edgell v. Haywood & Dawe*, (3 Atk. 352,) see *Otley v. Lines* and others, (7 Price's Exch. Rep. 274.)

MILLER'S CASE.

ALBANY, 5th February, 1828.

SIR—I received in due season from you, as presiding judge of a court of oyer and terminer, held in and for the
Whether in this state, a court of oyer and terminer
having sentenced a malefactor, upon conviction before them, to capital punishment, have power, after they have adjourned, on being afterwards, upon further examination, convinced of his innocence, to suspend his execution, or grant a reprieve, till the case can be laid before the pardoning power? *Quære*.

By the common law, the judges may reprieve, even after adjournment; and the only question is, whether this power be wanting here either from the frame and principle of our government, or is impliedly denied or withheld by the constitution. But vid. 2 R. S. 658.

This question examined upon the constitution, upon principle and authority, in a correspondence between CLINTON, governor, and EDWARDS, circuit judge, president of the oyer and terminer, of the city of New York, in a case (stated), wherein that court had reprieved the capital execution of a prisoner after sentence.

1st CIRCUIT, city and county of New York, minutes of the trial of William Miller, on the 10th of December last, for the murder of David Ackerman, by which, it appears that he was duly convicted of the crime, and sentenced to be executed on the 26th of January last. After an attentive perusal and deliberate consideration of this and the accompanying documents, and of the papers sent up by Mr. E. King, one of the counsel assigned for the prisoner by the court, and several conferences with Mr. R. Emmet, the other counsel, I came to the same conclusion with the court and jury, that the prisoner was guilty, and that therefore the executive ought not to interfere in his favor. This decision I communicated to Mr. Emmet on the morning of the 19th *ultimo*, as my definitive determination. Shortly after, on opening some letters on my table, I found a communication from you and a duplicate relative to this subject, in which you announced a change in your views, and assigned your reasons. I then mentioned to Mr. Emmet that I would look over your communication and re-consider the case, and inform him of the result on Monday; at which time I told him that I could not reconcile it with my sense of duty, and my views of the subject to interpose, either by a change or remission of the punishment, and that the law must take its course. On the same evening I wrote a letter of a similar import to the Rev. Mr. Stanford, chaplain of the prison, in answer to one received from him, so that the convict might be prepared as far as possible for the awful fate that awaited him. On the evening of the 27th January, I received, to my great surprise, a letter from you, informing me that the court of oyer and terminer had considered it their duty to reprieve the convict until the 16th of this month. On taking the subject into consideration, I have no doubt that the court, with pure motives, mistook their powers; and my only object in making this declaration is to prevent the act to which I except from being drawn into precedent. The constitution entrusts the governor with power over reprieves and pardons, and I think that, from the very terms, it is exclusive. The power claimed in this case by the court over which you preside, has never been exercised

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fore in this country ; it is incompatible with the arrangements of our government ; against the constitution ; and pregnant with the most mischievous results. It has been claimed in extraordinary cases by the judges in England ; but the great commentator who concedes it, qualifies the concession by saying that it is rather by common usage than of strict right. The judges are emanations of the regal power ; and even the king himself, in his regal office, though not in person, is always present in the eye of the law, in all his courts. Our government is divided into three great departments ; legislative, executive and judicial. Our judiciary, *as well as the others, must look for its powers in the grants of the constitution. Now, it must be admitted that the power that reprieves or pardons, is an executive power expressly delegated : and, however it may be represented in Hale, Hawkins and Blackstone, they can be of no authority on this occasion. There may be emergent cases in which reprieves or pardons ought to be granted ; in cases of pregnancy, insanity, or unexpected discovery of innocence. In these cases, if the executive power cannot operate, in all probability, the sheriff, relying on the justice of his country, might take the risk upon himself, and without any pretence of authority, exercise mercy upon indeed an awful responsibility. But this case is a different one ; it is a claim of right ; and the pernicious consequences to which it may lead are obvious. There is a court of oyer and terminer in every county, and there are 56 counties. Admit the power over reprieves to be in 56 courts : admit that these courts are more or less trustworthy, more or less liable to deception : may they not in many cases prostrate justice, and adopt measures of the most injurious tendency ? The power of the executive may be completely overthrown in this respect ; for, if a court may respite for a day, they may for a year ; and if on the exhibition of new testimony, they may try over a criminal, and declare him innocent, whom before they had pronounced guilty, and act as a respiting power, there will be no certainty in punishment ; a virtual pardoning power will be established in each county, instead of one express pardoning power for

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the whole state ! And, if the judiciary be exposed to sudden and powerful attempts on its humanity, as is probable in the present case, to suspend the sentence of the law, what must be the effect on the executive, when it comes before him, backed by judicial authority ; a prevalent sentiment against the punishment of death ; a reluctance in the firmest minds to accede to it ; plausible reasons for a milder course ; and conflicting opinions about the right of infliction after an intermeddling with the sentence ? Will not the executive, in almost every case, be compelled to change the punishment ? And in the present instance, which has been pronounced by the judges and jury the crime of murder, and which I may still believe so, with all due reverence to the opinion of the court, I am compelled by the extraordinary circumstances, embarrassments and perplexities attending it to interfere with a conditional pardon : And as the course to which I except is obnoxious to so many objections, and may be productive of so many evils, and is without precedent, so I sincerely hope that it may be without imitation.

I have the honor to be, &c.,

DE WITT CLINTON.

The Hon. Judge EDWARDS.

Governor Clinton dying intermediate the date of his letter, and the following reply, was succeeded by the Lieut Governor, to whom Judge Edward's letter was therefore addressed

To the Honorable NATHANIEL PITCHER, Lieutenant Governor of the State of New York.

NEW YORK, 22d February, 1828.

SIR—On the day ensuing the death of his excellency, the late Governor Clinton, I received by the mail a letter from him, respecting the proceedings of the judges of the court of oyer and terminer in this city, in reprieving for three weeks William Miller, who was under sentence of death. The Albany Argus, which was received by the same mail,

contained a copy of the letter ; and from an accompanying note to the editor, I presume it was published by the authority of his excellency. I forthwith prepared an answer ; but before it was sent, received the melancholy intelligence of his death. As his letter proceeded from the executive department of the government, and complained of an encroachment upon its powers by the judges of the court of oyer and terminer, I conceive it to be my duty to state to you, as the present executive of the state, the views entertained by the judges respecting their power, and the facts which induced them to exercise it in the case in question.

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Under the peculiarly delicate and painful circumstances in which I find myself placed, in consequence of the lamented death of his excellency, I shall endeavor to confine myself simply to such an exposition as I conceive necessary to relieve the judges from the imputation of having acted illegally or indiscreetly.

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I cannot but regret that his excellency did not seek a full exposition of the views of the judges, before he proceeded to the length of protesting against their acts ; and above all before he gave such a protest to the press. Public discussions between different departments of the government have a pernicious tendency, and ought never to be resorted to when they can be avoided consistently with a due regard to the public welfare. This, however, is a painful subject, and I should not have said so much, but from the conviction that my duty to the people and to my station, would not justify me in saying less. Were this whole subject one which concerned myself alone, propriety, perhaps, under the peculiar circumstances, would require that I should be silent ; but as it involves a point of law, which I conceive to be of vital importance ; and as it affects the respectability of an important judicial tribunal, whose conduct has been publicly arraigned by the late chief magistrate, silence on my part would be reprehensible.

His excellency stated, that on the 19th ultimo he received a letter from me, in which I announced a change in my views as to the guilt of the prisoner, and assigned my rea-

sons : that thereupon he mentioned to Mr. Emmet, one of the counsel for the prisoner, that he would look over my communication and reconsider the case, and inform him of the result on *Monday* ; at which time he told him that he could not reconcile it with his sense of duty and views of the subject, to interpose ; and on the same evening, wrote a letter to that import to the Rev. Mr. Stanford, chaplain of the prison. He then proceeds to remark, that on the evening of the 27th of January he received, to his great surprise, a letter from me informing him that the court had considered it their duty to reprieve the convict until the 16th of this month.

All this seems to import, what his excellency could not have meant, that the judges had reprieved the prisoner *with the knowledge of the fact* that the governor had refused to interfere after he had received my letter, and was fully possessed of all the facts in the case. Now, in the letter in which I *informed him of the reprieve, I stated some very important additional facts, and informed him, at the same time, that the judges had no information of his having received that letter, either from his excellency, or from any other source, and that as well from other circumstances, as from the non-acknowledgement of it by his excellency, the judges were of opinion that he had not received it. Even in his letter to Mr. Stanford, he made no mention of his having been recommended to mercy by me, or of the receipt of my letter. That the non-acknowledgement of an official letter so nearly concerning the life of a human being, alone warranted the conclusion that it had not been received, will not be questioned.

The question in issue is simply whether the judges have power of granting reprieves to such time (and such time only) "as is necessary to give room to apply to the executive for either an absolute or conditional pardon," when it is apparent that injustice would be done by suffering a sentence to be executed. Upon a thorough examination of the authorities, it appears to me that the law, true to the merciful spirit which pervades it, does, under such circumstances, make it the bounden duty of the judges to interfere

In the reign of Queen Elizabeth the question was submitted to the king's bench, whether the justices of assize could, after the session had adjourned, lawfully command the sheriff to respite the execution still longer ; and by the opinion of all the justices, the order for further respite was adjudged good enough, and they said that the custom of the realm had always been so, (2 Dyer, 205.)

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Blackstone says, that "reprieves may be first *ex arbitrio iudicis* either before or after judgment ; as when the judge is not satisfied with the verdict, or the evidence is suspicious, &c., or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session is finished and their commission expired. But this is rather by common usage than of strict right." -(4 Bl. Com. 394.)

*Lord Hale says, that "although the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for *treason* before him, yet he may upon due circumstances do it, as well in case of treason as felony. And this reprieve he may grant, and after he hath granted it, may command execution after the sessions and adjournment of the commission." (1 Hale's P. C. 368.) He afterwards says, "and this by common usage.")

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Chitty says, "the more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs of common right to every tribunal which is invested with authority to award execution. And this power exists even in case of high treason, though the judge should be very prudent in its exercise." (1 Chit. C. L. 617, 1st ed. 758.)

The law as here laid down is also sanctioned by Hawkins, P. C. B. 2, c. 51, s. 8, and various other writers.

These authorities leave no ground for question as to the common law upon the subject.

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But it is alleged that this law has no application to this country, because in England the judges possess the power of reprieving in consequence of their being "emanations of the regal power; even the king himself, in his regal office, though not in person, being always present in the eye of the law in all his courts." This reason is not given by the great and venerable expounders of the law; on the contrary, Chitty says, "the power of granting respites belongs, of common right, to every tribunal which is invested with authority to award execution."

Upon the abolition of the regal power in this country, the whole sovereignty became vested in the people; and their power to the extent they have delegated it, is with the judges here as the power of the crown is with them in England. In that country the power of the judges is limited and defined by law as well as in this. The source, therefore, from whence this power is derived, I apprehend makes no difference as to its extent.

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*But it is alleged that Blackstone qualifies his concession by saying, that it is rather by common usage than by strict right. The qualification is however confined to cases where the session is finished, and the commission of the judges expired. In support of this, he quotes 2 Hale, 415, who says simply, "and this by reason of common usage." Hale quotes the case of Dyer, above stated, where all the judges say that "The custom of the realm had always been so." If the custom of the realm had *always* been so, by necessary consequence it had become the common law of the realm

Now, as it is expressly declared by the constitution of this state, that such parts of the common law as did form the law of the colony of New York in April, 1775, shall be and continue the law of this state, except so far as it is *repugnant* to the constitution; and, as when the courts of oyer and terminer were organized, they necessarily became vested with all the common law incidents of such courts, subject to the foregoing restriction; and, as the judges of the oyer and terminer, by the common law, do possess the power of reprieving, it follows that their power, unless *repugnant*

to the constitution, is sanctioned by it ; and this brings me to the only remaining question, which is, whether this power is *repugnant* to the constitution ? Upon this point his excellency made use of the following expression : " The constitution intrusts the governor with power over reprieves and pardons ; and I think, from the very terms, *it is exclusive*."

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As this is the point upon which the whole question turns, I regret that his excellency did not favor the public with his reasons ; but has simply given an expression of his opinion.

Although the executive power is declared to be in the governor, yet the power of reprieving, in its *own nature*, is no more an *executive* than a *judicial* power. It is no more an executive power than that of awarding execution, which is an order consequent upon the judgment of a competent tribunal, that the prisoner ought to be executed ; and the case of a reprieve is only an order consequent upon a judgment, that he ought to be respited. And although the executive power is declared to be in the governor, yet he has no power beyond what is specifically enumerated in the constitution. *A contrary doctrine would invest him with all the powers of the crown. All the power of the governor, as it respects reprieves, is contained in these words in the constitution, viz : " The governor *shall have power* to grant reprieves and pardons after conviction for all offences, except," &c.

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General Hamilton, in the 82d number of The Federalist, upon the subject of exclusive delegation of authority to the general government, remarks that " this *exclusive* delegation can exist only in one of three cases ; where an exclusive authority is in express terms granted to the union ; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states ; or where an authority is granted to the union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think they are, in the main, just with

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respect to the former as to the latter. And under this impression I shall lay it down as a rule, that the state courts will *retain* the jurisdiction that they now have, unless it appears to be taken away in one of the enumerated modes." These remarks are equally as applicable to power delegated by our constitution, which is the law paramount of the state, as to the power delegated by the constitution of the United States, which is the law paramount of the union.

Now as the words of the constitution are, not that he shall have *exclusive* power; nor even *the* power which might imply *the whole power*; but it is more guarded, and is simply "shall have power"; and as there are no express words excluding concurrent jurisdiction, nor any phraseology which implies that the *whole* power shall be vested in the governor, and as the constitution has expressly declared that the common law shall be and continue the law of the state, excepting so far as it is *repugnant* to the constitution, it follows, that unless the power of the governor is of such a nature as to be repugnant to the qualified limited power claimed by the judges, their power remains; and that they do, as in the words of his excellency, look for their powers in the grants of the constitution; and this as fully as if the constitution had said *that they should have all their common law powers in cases of reprieve, excepting so far as it is repugnant to the constitution. That concurrent power can exist over the same subject matter, and yet not be repugnant, is apparent. If, after the governor had reprieved, the court should order an execution, or if the governor had the power of ordering an execution, and should exercise it, and the judges should reprieve, then the interference of the judges would be an act repugnant to his power. But his power is of granting reprieves and pardons, and a temporary reprieve by the judges, "*so as to give room to apply to the executive,*" lays no barrier in the way of his executing his power in its most ample extent. It is, on the contrary, auxiliary to that power; and in the present instance, it afforded him an opportunity of doing, upon a new statement of facts, what

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ne forever would have been precluded from doing if the sentence had not been respited. It is solely for this purpose, and is so declared in the books; and to such extent only as is necessary. "in order to give room to apply" to the executive to exercise his prerogative.

Far be it from me to call in question the wisdom of placing the power of granting reprieves and pardons in the executive. All that I contend for is, that although he indubitably has the ultimate or superior power, and that there is no power which can prevent him from reprieving, yet that there is nothing in the constitution annulling the qualified limited power of the judges. Constitutions like laws should receive such a construction as will advance the remedy and suppress the mischief. The object of this provision is to enable the executive in all cases to prevent injustice. The limited power of the judges is only to remove an obstruction of their own creating, in the way to the mercy seat; a power necessary to enable the executive to exercise his prerogative upon every suitable occasion; a power which has been sanctioned by the experience of our ancestors for ages, and which was the offspring of the imperious dictates of justice and humanity. That which I contend against is a harsh and rigid construction of the constitution, which would insure a haste in shedding of blood, as foreign to the humane spirit of our criminal code as to the benign precepts of our religion. *Even in England, notwithstanding the jealousy with which the crown has ever guarded its prerogatives, it has never been considered an encroachment. The argument that this power has not been before exercised in this state, is of no force, unless it can be shown that the judges have refused to exercise it upon suitable occasions. The non-exercise of a power does not annul it. It is true, as stated by his excellency, that courts may arrive at a conclusion that a prisoner is innocent, whom they before pronounced guilty; and if they should, it would be either in consequence of new evidence, or of different views of the same evidence. If the former, (as in the present case,) there would be nothing extraordinary in it and if the latter, it would only

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prove that their sense of justice rose superior to their pride of opinion.

In adverting to the history of our government, I can discover nothing to warrant the inference that it was intended to divest the judges of this power. It certainly did not accord with the temper of the times when the constitution was adopted, to invest the governor with more than kingly powers; nor to pay less respect to the safety of the citizen than was paid by the crown to that of the subject. Why, then, are we to presume that the convention intended to remove from the citizen a safeguard, to abrogate a power, which, in its operation in the mother country, had often been instrumental in preventing injustice? Why, when the want of such a power, might leave upon the land the stain of innocent blood?

But against the reasonableness of this construction, it is urged by his excellency, that there is a court of oyer and terminer in every county, and that this power in the courts might be abused to such an extent as completely to overthrow the power of the executive in this respect. Arguments against the exercise of power, because it may be abused, are of no legal validity. The law will not presume that its officers will abuse their trust. Were it otherwise, it might be shown by the same course of reasoning, that under the constitution the courts have not the power of fixing the time of execution, for if they have, they might order the execution forthwith, which would oust the executive of his prerogative of pardoning, or they might order an execution at so remote a period, as would render his prerogative of reprieving of no avail. So, on the other hand, the executive, by the indiscriminate exercise of the pardoning power, might prostrate the criminal justice of the state.

But how stands the experience of the mother country, as it respects abuse arising from the number of courts of oyer and terminer? In England and Wales there are 52 counties, and of course 52 courts of oyer and terminer are annually organized in them.

Yet, immemorial experience has proved that no abuse has ensued from their powers. Surely it will not be contended

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that the framers of the constitution considered our courts as less trustworthy than those of England. Surely, after investing them with the most delicate, the most responsible of all power, that of passing upon the lives of their fellow beings, they would not hesitate to invest them with the power of deferring the execution of their own sentence so long as would enable a miserable victim to seek the mercy seat, when the stern dictates of justice demanded it. Human nature revolts at the idea of executing one who has become a lunatic, a woman quick with child, or one whom subsequent developments have clearly shown to be innocent. And yet, if the exposition of the constitution by his excellency is correct, all these consequences might ensue, provided the settled paramount law of the land is permitted to take its course.

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But his excellency, realising the necessity of the case, says, that upon such exigencies, "In all probability, the sheriff, relying on the justice of his country, might take the risk upon himself, and, *without any pretence of authority*, exercise mercy upon, indeed, an awful responsibility." But the sheriff could not do this without violating his oath of office; he could not do it without trampling upon the authority of the judicial tribunals; he could not do it but by acting upon a principle which, if extended, would destroy the due subordination and harmony of the government. But what if he should insist upon doing his duty as required by law? The moral sense of a whole community might be outraged at witnessing the execution of an innocent man; a scene, which of all others, would be most liable to excite them to tumult and outrage.

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His excellency seems to have rested under the impression that the interference of the judges in this case was "*by a sudden and powerful attempt upon their humanity*." I trust that a full development of the motives which governed them will show there was no want of becoming firmness upon the occasion, and that their conduct ought rather to be ascribed to a due regard to the rights of the prisoner and the public justice of the land.

The evidence of the murderous disposition of the priso-

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ner was derived mainly from the testimony of the boy, and the subsequent declarations of the prisoner.

In the deposition of the boy before the coroner of New York, (which was not read on the trial,) he swore, among other things, that the prisoner knocked the deceased into the boat alongside the sloop, knocked him down again with his fist, stamped upon his face, and continued inflicting blows with his fist, sticks and stones, about one half an hour; that he continued beating him from Fort Gansevoort to Spuyten Duyvel creek; that he then threw him overboard, and pulled him in again; that the prisoner then stamped upon him, and beat him with his fist, and struck him several blows with a handspike on his head and face.

In an examination before the judges on the day the reprieve was granted, he stated that the prisoner struck the deceased more than one hundred blows with a handspike, sticks of wood, stones, ropes, and by kicking and stamping upon him. The two very respectable physicians who were examined on the trial, both said that they examined the body critically; that there were *no marks of violence excepting on the head, and there only three*, one under each eye, and that, which was the mortal one, on the right temple. This wound one stated, "had an appearance as though produced by a club or falling on a stone." And the other one said, "that falling on a sharp edge, as the gunwale of a boat, would have done it." The statement of the physicians as to the *number of marks* being so totally inconsistent with those of the boy *as to the number of blows, and being satisfied at the time of the reprieve, as well from personal examination of him, as from the testimony of his teachers, of the extreme imbecility of the boy; and also noticing various discrepancies in his testimony at different times, and the very improbable account which he gave of the whole transaction, it was not considered safe or consistent with the humane spirit of our laws, to repose any confidence in his testimony. The testimony of this witness, therefore, which was all the evidence of the shocking details of the case was laid aside.

As to the brutal declaration of the prisoner on board

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Capt. Green's vessel on surrendering himself, which was sworn to by one of the witnesses, and which bore powerfully against him on the trial, it does not appear from the deposition of Capt. Green, before the coroner of Westchester, (but which was not read on the trial) that he made any such declarations, although he states what the prisoner did say. Two other men swore at the same time that the statement made by Capt. Green was correct, and a third, that he was not present all the time, but that it was correct as far as he had heard it. Capt. Green was sick, and unfortunately not present on the trial. He has subsequently stated, in the hearing of Alderman Thorp, that the prisoner did not make use of a rash expression, but gave a reasonable account of the business. He also made statements which went in explanation of the declaration of the prisoner at Sing Sing. This came to the knowledge of the judges on the day the reprieve was granted. But as Green was then absent, his deposition could not be taken.

Under these circumstances, as those witnesses were of course sworn to tell the whole truth, the judges could not in justice to the prisoner, visit upon him the declarations as testified to.

On the trial our attention was particularly directed to the inquiry, whether the deceased did not come to his death by being knocked into the boat. But one of the physicians stated, that in his opinion he could not have moved again after receiving the blow on the temple. This opinion bore strongly against the prisoner on the trial, because, after being "knocked into the boat, he was again on board the vessel. Subsequently to the trial, however, a number of our most respectable physicians certified that he might have moved for some time after it.

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The case, then, stripped of the inconsistent parts of the testimony of the boy, and the violent declarations of the prisoner, resolved itself mainly into this ; that the deceased, who was a stranger to the prisoner, attempted to take the helm from him who had the command, and was thereupon knocked into the boat which lay alongside of the quarter-deck, and received the mortal wound by the fall ; and that

afterwards the prisoner hailed Capt. Green's sloop, stated that he had a dead man on board, and had killed him in his own defence, surrendered himself a prisoner, and wished to be taken to New York for trial. And this would unquestionably be nothing more than manslaughter. There are other facts in the case; but, as I apprehend they do not, as far as satisfactorily attested to, materially vary the view I have taken, I shall forbear entering into a further enumeration, as the testimony was reported at length to the executive.

Upon a consideration of all the circumstances, the judges and the district attorney were of opinion that the evidence, taken in connection with the facts subsequently disclosed, was not such as would justify the execution of the prisoner; and he was reprieved to such time as would enable the executive to become fully informed of the case, and afford him an opportunity of exercising his prerogative, if he should deem it proper.

Believing, as it was natural we should, that the new facts and views, which had wrought so radical a change in the minds of the judges and of the district attorney, would at least have created so much doubt in the mind of his excellency as to the guilt of the prisoner, as would, in the humane spirit of our laws, have rendered his execution unjustifiable, it was with much surprise that I learnt, upon perusing his excellency's letter, that, to use his own expression, "he might still believe him guilty of the crime of murder," and that he was compelled "by the extraordinary circumstances, embarrassment, and perplexities, arising from the reprieve by the judges, to interfere with a conditional pardon." Or, in other words, but for the reprieve, his excellency would have suffered the prisoner to have been executed. How the dispensing with the execution could have been necessarily consequent upon the reprieve, I do not distinctly apprehend; for his excellency himself, in the case of Diana Selick in this city, reprieved her for a limited period, and then suffered her to be executed. In the mother country, reprieves are not considered as giving any claims for pardon; and executions after them have fre-

quently taken place. In the case of Miller, no difficulty was created as respected the prisoner, by the reprieve of the judges; for he was given distinctly to understand that he was not to infer from it that the governor would interfere; that it was merely the act of the judges to give the governor time to look into the case, and afforded no indication of what might be his opinion.

I have now given a full exposition of the views of the judges, both as to the law and the facts. It was under these circumstances, and resting under a conviction that upon his excellency being fully informed of the case, he would conceive it to be his duty to reprieve, that we were reduced to the alternative of their suffering the prisoner to be led out to execution, or of repreiving him.

But reverse the picture. Suppose that the judges had refused to reprieve, and the governor, upon being fully informed of the case, had, in pursuance of their expectations, conceived it to be his duty to reprieve him, but that the prisoner had in the mean time been executed! what judgment would a moral community have then formed of their conduct?

In conclusion, I consider it my duty to state, that I realise most sensibly the delicacy, the novelty of the situation of an important judicial tribunal being arraigned by the chief magistrate at the bar of the public. Under no ordinary circumstances would I be brought to consider it as consistent with a due respect to the dignity of the court over which I have the honor to preside, or to the sovereignty of the people who placed me there, and whose laws are there administered, to answer to such a call. But, as it was the chief magistrate *who has thus arraigned them, on a charge of encroaching upon his constitutional powers, and an intimation that, in the case in question, they probably acted under the impulse of feeling, instead of the guidance of judgment; and as the tone of his letter seems to imply that he possessed the *exclusive* power of expounding the constitution, so far as it respects the powers of the executive, I could not reconcile silence to my sense of duty.

By the arrangements of our constitution, the judicial

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tribunals are bound to expound the constitution and laws, according to the best of their own judgment; and in the discharge of their trust, know of no superior controlling power but the courts of superior jurisdiction and the legislature. And although they will always carefully endeavor to keep within the scope of their powers, and will ever pay due respect to any suggestions from the executive as to the bearing of their decisions upon his prerogatives, yet in the discharge of their duties, I trust they will ever look, and look solely, to the constitution and laws for their government, and will never hesitate to follow where they and justice lead the way. I have the honor to be, very respectfully, your obedient servant,

OGDEN EDWARDS.

PATTISON and others *against* HULL and others.

PATTISON, G. & H. Vail, N. & H. Weed, and A. Parsons, filed their bill, stating that, on the 28th of July, 1826, The assignment of a judgment for a debt carries the debt; and if the latter be secured by mortgage, it carries the mortgage interest.

So, if the assignment be of only part of the judgment, and consequently a part of the mortgage debt, an interest on the mortgage passes, corresponding to the proportion of the debt assigned.

The legal effect of a written instrument, though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained or controlled by parol or extrinsic evidence, than if such effect had been expressed.

Thus, where a debt, secured by mortgage, is assigned by writing under sale, without mention of the mortgage, by which a mortgage interest passes as an incident to the debt, it cannot be shown, by parol, that the assignor intended to reserve the mortgage.

But a debt or judgment, or any part of a debt or judgment secured by mortgage, may be so assigned as to separate it from the mortgage, by a proper reservation in the assignment. All negotiations between the parties, prior to, or cotemporaneous with the execution of deed, are merged in it.

A deed of a thing passes the incident as well as the principal, though the latter only be mentioned; and this effect cannot be avoided without a reservation in the deed, or at least by an instrument cotemporaneous with, and therefore making a part of the deed. And this rule is the same at law as in equity.

The correction of a deed on account of mistake, ignorance or accident, cannot be made collaterally; but only on bill filed presenting the very point, so that an issue and proof may be taken upon it. Then, if the ground of relief be made out, the court reforms the deed.

Where a bill against several defendants makes an admission favorable to some, against whom the bill is taken *pro confesso*, but the admission is unfavorable as to others, who appear and take issue, and disprove it, it must yet be taken as true in respect to those who did not answer.

Thus, where a bill for foreclosure of a mortgage stated that the first instalment which fell due on the mortgage had been paid, to which bill the mortgagors and divers incumbrancers were made parties: and one set of incumbrancers appeared and claimed that the instalment had not been paid, but was due and belonged to them, and claimed that the foreclosure should proceed as well for that as the residue of the mortgage debt; and established this claim in proof; but the bill was taken *pro confesso* against all the other defendants; held, that, as to the latter, the instalment must still be taken as paid, though otherwise as between the parties litigant. *Semb.* that, to warrant a foreclosure for the whole debt against all the defendants, a cross bill should have been filed.

Semb. a cross bill is always necessary where the defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him.

A decree of sale on foreclosure of a mortgage is not to be made till the master's report on the account shall be confirmed.

A master may, after a hearing before him on reference is closed, and before he has settled the draft of his report, receive further evidence, if he be satisfied that it was discovered after the first hearing.

If a debtor owe his creditor several debts upon distinct causes, and pay him a sum of money, he (the payor) has a right to say to which debt or debts the money shall be appropriated provided he directs this at the time of the payment; but if he does not so direct, the creditor may apply it as he pleases. And *semb.* where it is, in the nature of the thing, indifferent to the debtor to which debt the payment shall be applied, and the debtor does not direct, the creditor may make the application at any time after the payment.

Where the debts due by a debtor to his creditor are of different characters, and a general payment is made, and neither party applies the payment at the time, the law will then apply it, upon the presumed intention of the debtor, to that debt a relief from which will be most beneficial to him.

Thus, if the debts be a mortgage and account, or judgment and account, the law will ap-

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ply the payment to the mortgage or judgment in preference to the account, because the former would bear most heavily on the debtor.

Parallel between the civil and common law as to the application of payments. Note (b) to this case.

Costs in the court of chancery are given to, or withheld from the successful party in the discretion of the court.

The course of the court is uniform, where the question raised is a fair one, and difficult for the parties to settle themselves, not to give costs against the unsuccessful party.

S. *Hull, M. Hopper, Z. Baker and S. F. Hervey, being seised in fee of a farm in the town of Saranac, Clinton county, made their bond to Parsons, in the penalty of \$7000, conditioned to pay him \$3732 75 ; viz. \$500, with interest, and on the 1st of October, 1826 ; \$500 on the 1st of June, 1827 ; and the residue in different instalments at several times after, with interest ; that on the same day, the obligors mortgaged to Parsons in fee, the above mentioned farm, to secure the sum mentioned in the condition of the bond.

That Parsons, the mortgagee, at the date of the mortgage, being indebted to Pattison and the Vails in \$2000, assigned to them, on that day, the two first instalments of \$500 each, with interest, as a collateral security for \$1000, part of the debt ; that Parsons, the mortgagee, being also indebted to the Weeds in \$2400, on the 25th of October, 1826, assigned to them the balance then due on the bond and mortgage, \$2732 75, besides interest ; they to collect sufficient to pay and satisfy their debt ; and the balance to belong to Parsons.

Then after setting forth numerous successive judgments, in favor of different creditors, obtained against Hall and Hopper after the date of the mortgage, and being a lien on the mortgaged premises, and (among others) a judgment of \$16,000 in favor of Southwick, Cannon and Warren, docketed October 28th, 1826, the bill stated that Parsons, the mortgagee, recovered judgment in the supreme court, in the term of February, 1827, against the obligors in the above bond, for the penalty, which judgment was perfected April 12th, 1827.

That the first instalment of \$500 due on the bond had been paid.

That all the residue of the moneys mentioned in the bond remained unpaid.

The bill prayed a foreclosure and sale ; and that process of subpoena might go against the mortgagors, and all the judgment creditors, including Southwick, Cannon and Warren, who alone answered ; the bill being taken *pro confesso* against the other defendants.

Southwick, Cannon and Warren answered, admitting all

the facts as stated in the bill, except the payment of the *first instalment*. In respect to this, they answered that the defendant, *Cannon, had conversations with Pattison and the Vails and their attorney, some time in the winter or spring of 1827, in which they informed him of the assignment to Pattison and the Vails of the two first instalments; and that they were entitled to be paid in preference to the other assignees, (the Weeds;) and that a judgment had been obtained upon the bond. That it was agreed between them and Cannon, acting in behalf of Southwick, Cannon and Warren, that if the latter would pay Pattison and Vails the first instalments, (they P. & Vs.) would assign their interest therein to Southwick, Cannon and Warren. That they accordingly, in June, 1827, advanced \$562 60 to Pattison and Vails, in pursuance of the proposition; and the better to insure the re-payment of that sum to Southwick, Cannon and Warren, they, Pattison and Vails, on the 20th of June, 1827, assigned, under their respective hands and seals, the judgment upon the bond against the obligors, to Southwick, Cannon and Warren. That the judgment was in favor of Parsons, the mortgagee. That the first instalment is wholly due and unpaid; and they (S. C. & W.) insisted that they were entitled and should be first paid with their costs, out of the proceeds arising from the sale of the mortgaged premises, in priority to any claim set up by the complainants; and that the \$562 60 and interest thereon should be included in the amount to be found and reported due on the bond and mortgage, and in the amount for which the premises should be sold; and that the whole should be decreed to be paid to the defendants (S. C. & W.) out of the proceeds of the sale, either in priority to the claims set up by the complainants, or otherwise, as should appear to be just and equitable, according to the respective rights of the parties.

A general replication having been filed, proofs were taken. The assignment from Pattison and Vails to Southwick, Cannon, and Warren, was in evidence, sealed by the assignors, and dated June 20th, 1827. It described the judgment on the bond as being for the recovery of

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\$500 debt, and \$49 83 costs; and then ran as follows
"In consideration of 549 dollars and 83 cents to us in hand paid, at or before, &c., we have granted, bargained, sold, assigned, transferred, and *set over, and by these presents do grant, &c., unto the said Southwick, Cannon, and Warren, their executors, &c., the said judgment so recovered in the above suit, with full power and lawful authority to take all necessary proceedings for the recovery of the said sum of 549 dollars and 83 cents, with interest on the same from the 22d day of February last."

Considerable testimony was taken in regard to the negotiations which led to this assignment, and other communications between the parties, before and at the time of its execution, with a view to show that the real intention of the assignors and assignees was merely to pass all title to the judgment as a collateral security to the assignees for the consideration paid by them; the assignment not to have the effect to carry any interest in the mortgaged premises; but as this testimony was laid out of view, in the decision of the cause, it is not stated particularly.

The cause was brought to a hearing on the pleadings and proofs at the October term of this court, 1828; and was argued by
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ington county,
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1828.

Marsh, for the complainants, and

Swetland, for the defendants, (S. C. & W.)

COWEN, Circuit Judge. The defendants, Southwick, Cannon, and Warren, claim that, in legal effect, the assignment carried to them, not only an interest in the judgment to the amount of the instalment, but a corresponding interest in the mortgaged premises themselves.

This view of the case is strenuously resisted by the complainants; and, although the general rule is admitted, that a direct and unqualified assignment of the whole mortgage debt carries the entire mortgage interest in the

and, it is contended that the assignment in question is not within the rule.

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In the first place, it is said the assignment is of a judgment for the debt; of a thing collateral; and not of the debt itself, or any part of it.

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The assignment is of the judgment for the instalment \$549 83, "with full power to take all necessary proceedings for its recovery." This undoubtedly cut off the right of the complainants to collect that sum, either on the mortgage, bond, or judgment; and the mortgagors, after notice, became, both in equity and at law, debtors *pro tanto* to the assignees. Both may object to the complainants' enforcing either of their remedies for anything more than the residue. The assignors then parted with all their interest in, and control over the debt, to the assignees. The former have nothing left as to the \$549 83, either in the bond, mortgage, or judgment. The assignment of a judgment necessarily carries the debt; nor is it possible to separate them. The judgment would be barren, nor can we conceive of its existence without the debt. I must, therefore, hold the debt to be directly assigned in this case; and all the effects must follow which the law attaches to an assignment of that character. One of these is, that an interest in the mortgaged premises passes as an incident to the debt which is the principal. [1] (Jackson v. Blodget, 5 Cowen, 202, 206, and the cases there cited.) True, and this is made another ground for taking the assignment out of the general rule; here is not a transfer of the whole debt due upon the mortgage; but only a small part of it. That would be a valid objection against its carrying the whole mortgage interest; but it by no means follows that the whole interest must remain behind. It is the well settled doctrine, that a mortgage is a mere incidental security for the debt, like a judgment or

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[1] 4 Kent † 194. Johnson v. Hart, 3 Johns. Cas. 322. 1 John. 580, S. C. Jackson v. Willard, 4 id. 41. Renyan v. Messereau, 11 id. 534. Jackson v. Davis, 18 id. 7. Jackson v. Brown, 19 id. 325. Wilson v. Troup, 2 Cow. 195. Hatch v. White, 2 Gall. 155. Dick v. Mawry, 9 Smeed & M. 448.

bond. Foreclosing the mortgage is one of the remedies for default of payment; and all incidental securities, all remedies for a debt, follow it, and reside with the creditors to the extent of their several claims, whether of the whole debt or a part; and must be subject to their control so far as those securities or remedies may be necessary to the collection of the debt. If it be conceded, and it has not, and cannot be properly denied, that a single debt may in equity be parceled out among several, it follows that each must share in the remedies and securities. When you admit that choses in action are an article of traffic, you must allow the creditor not only to sell or mortgage the whole, but also any part, and transfer the part to be holden in severalty or in common; and you must vest in the assignee a *corresponding control over all the incidental means of collection. Suppose the whole of this mortgage debt had been assigned to Southwick, Cannon, and Warren, except the first instalment, which had been left in the complainants, it appears to me the situation of the parties would have been exactly reversed in all respects. Indeed, according to the argument on the side of the complainants, this mortgage has become perfectly nugatory. Both Pattison and Vails and the Weeds are but partial assignees of undivided shares; and if, for want of totality, no interest can pass in the mortgage, they have no rights here as complainants. There are objections as strong against the express assignment of a portion of mortgaged premises, as against an implied assignment. The only objection against either must be the difficulty of ascertaining the aliquot proportion of each. If this is to prevail, there is then no mortgage interest left, except the contingent residuary one of Parsons, the mortgagee. That is certainly as available to Southwick, Cannon, and Warren, as to the complainants.

There is nothing, then, on the face of this assignment, to avoid the usual consequence. The debt passed; and with it a part of the mortgaged premises, bearing the same proportion to the whole as the instalment bears to the entire mortgage debt.

But it is insisted that, although such may be the legal effect of the assignment, it is subject to be contradicted by showing the real intention of the parties, which may be done by parol, or other evidence extrinsic the paper itself; and that there is testimony of that character sufficient in this case to establish an intention that the mortgage should be wholly reversed to the complainants.

There can be no doubt that it was competent for the parties to separate the debt from the mortgage; that is, to put the assignees upon the judgment alone for their security, leaving to the assignors their entire interest in the land. In *Green v. Hart*, (1 John. Rep. 580, 591,) this power of separation was recognized by Spencer, J. In that case, the note of Johnston had been endorsed by Green to Hart; and a mortgage to Green by Johnston's trustee for securing the note was "delivered by the endorser to the endorsee. This, it was held, carried the interest in the mortgage, which was an incident of the debt; unless a different intention was established, the burthen of showing which lay with the endorser. The admission that such an intention might be shown, is now relied on by the counsel for the complainants as letting in the parol proof to establish it here. The concession of the learned judge does not discriminate as to the kind of evidence; nor was his attention called to that point. The difficulty there, rested in the proof which had been received not being clear and full. There is little doubt, however, that oral evidence would have been admissible in that case. The assignment itself was mainly oral. The only written evidence, was the endorsement of the note and a receipt, either of which may be varied by parol evidence, even as between the parties. Parol evidence is always admissible to show the particular purpose for which an endorsement is made. It may be shown that the parties never intended to pass any beneficial interest; but merely to create an agency. The whole transaction was then, in effect, a mere oral bargain and sale of the assignor's interest, which, of course, might be qualified, explained, or contradicted in whole or in part, by evidence of the same degree. But the principal case is

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widely different. Here the assignment of the debt is in the more solemn form of a deed. Various conversations were held between the solicitor of the assignors and some of the mortgagors on the one hand, and Cannon, who transacted the business for the assignees, on the other. These conversations related to the consideration of the assignment being advanced by the assignees as a payment of the first instalment, so far as the mortgage was concerned, leaving the assignees to their remedy on the judgment alone. The effect of such an arrangement, properly made, would have been to pay so much *quoad* the mortgage. All these conversations were, however, some time previous to the execution of the assignment. At that time nothing was said, though had the assignment been also by parol, it would still be open to the remark, that it was, in fair intendment, but a consummation of the terms to be gathered from the prior negotiations. Take the same effect *then as if those terms had been reiterated at the execution of the assignment. There is no position better settled, than that all negotiations prior to, or cotemporaneous with an agreement under seal, are merged in it. A deed comprehends and passes the incident as well as the principal, though the latter only be mentioned. The legal effect of the instrument is the same in respect to both. The form in which such an effect is produced, in the one case by express words and the other by implication, does not take from the conclusiveness of the effect. A deed of land omits to mention emblements; yet they pass as effectually, and a parol reservation of them is as completely nugatory as if they had been named in the deed. (*Austin v. Sawyer*, May term, S. C. 1828. M. S. (a) [1] You cannot, at law, avoid the legal consequence, except by a clause in the deed itself, or a simultaneous paper which is taken as entering into, and forming a part of the deed. The same rule prevails in equity. [2] It was decided, on a bill filed by the assignees

(a) Since reported, ante, 39.

[1] See 4 Kent, 468.

[2] See 2 Cowen & Hill's notes to Phil. Ev. 621, *et seq.* where all the leading American authorities are collected.

of an equity of redemption, seeking directly to vary the terms of a mortgage by setting up an oral stipulation on the part of the mortgagee, "That parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement." (*Stevens v. Cooper*, 1 John. Ch. Rep. 425.) In that case, it was insisted at the bar that the mortgage was of a mere personal nature, and incident to the debt; and therefore, the subject of sale without writing, the same as any personal chattel. The answer given was, that the evidence offered was not only denied by the statute of frauds, but was contrary to the maxims of the common law. The following cases also go directly to the same point: *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 id. 219; *Meres v. Ansell*, 3 Wils. 275, 6; *Meads v. Lansingh*, 1 Hopk. 124. *Moses v. Murgatroyd*, (1 John. Ch. Rep. 119, 128,) is relied on by the complainants. There an assignment under seal absolute on the face of it, of certain goods, was intended to be in trust for securing debts. On a bill filed by the creditors against the administrator of the assignee, charging that the assignment was in trust to secure their debts, the administrator answered that the assignment was for the general indemnity *of his intestate against advances made by him for the assignor. Parol proof was received, after this admission that the deed was false on its face, to show the real trust. This case must have gone on the ground mentioned by Chancellor Kent at p. 128, that there was mistake, ignorance or accident in framing the deed; otherwise the case is anomalous, and a departure from settled principles, which cannot be imputed to the learned chancellor who decided it. The correction of an instrument on any of the grounds mentioned by him, is a distinct head of equitable power, never exercised but on a bill filed praying the correction directly, or what is equivalent, where the parties consent to go into the inquiry. The mistake, or other ground of correction, must be charged in the bill, so that it may be answered, and an issue taken upon it. The deed will then, if the evidence warrant it, be reformed and set right by the decree. (1 Bro. C. C. 93, 4. 2 id. 219.) But you cannot do this col-

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laterally. It cannot be done without *allegata et probata* upon the very point.

From this view of the case it must be taken, as between the complainants and the defendants Southwick, Cannon and Warren, that the first instalment is still due.

But how is it in respect to the other defendants, the mortgagors, and the numerous judgment creditors against whom this bill has been taken *pro confesso*? The bill alleges a part payment of the mortgage, which all the defendants, except Southwick, Cannon and Warren, have regarded as correct, and make no defence. It is most unjust, therefore, in respect to them, that these premises should be charged with the first instalment. They may all have an interest. At any rate some of them have. The parties litigating might as well insist on selling for double the original mortgage. In respect to themselves merely, they might do so for aught the other defendants would care. Suppose these defaulting defendants had been put to sleep by an admission on the part of the complainants, that the whole mortgage had been paid except 10 dollars: could it be swelled as against them to its original amount at the instance of their co-defendants? I suggested this difficulty on the argument; it was not satisfactorily answered then; and it still seems to me utterly insurmountable. It struck me then, and I think so still, that Southwick, Cannon and Warren should either have joined as complainants, or made themselves so by a cross bill. When they saw that their own share was treated by the foreclosing parties as paid, they might, by a cross bill, have become complainants, bringing in all the other parties, and giving them a chance to contest the relief now sought in the answer. This is the uniform, and, I apprehend, the only course where a defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him. Both the original complainant, and all the co-defendants, may be called to answer the cross bill, and must be where this is necessary to the protection of their rights. (Coop. Eq. Pl. 85.)

But both parties litigant say go on and sell; and however embarrassed the cause may be, they have a right to say so,

as to all except the first instalment. This is a matter entirely between Pattison and Vails on one side, and Southwick, Cannon and Warren on the other; and seems more properly a subject of settlement after the master's report shall come in. I shall, therefore, suspend all directions as between them till that time. The decree of sale will of course not be made till the report shall be confirmed. Such is the settled practice of the court. (*Gardiner v. Garniss*, 1 Hopk. 306.)

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I shall want the amount due on the first instalment separately; the amount due on the mortgage beside that instalment; and the aggregate of both; each of the three sums to be set down separately. (2 Pow. on Mort. 969, 970.)

I will then say whether the complainants shall be charged as trustees of Southwick, Cannon and Warren, to the extent of the instalment, if the premises sell for so much, or whether the latter shall come in and have their instalment taken as a part of the amount for which the premises are to be sold; and in such an event, whether they shall be preferred, or take *pro rata* with the complainants.

Order of reference, accordingly; and to state amount of incumbrances. All further directions reserved till report.

*At the January term of the court, 1829, the master's report came in, stating that the 1st instalment with interest amounted to

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\$ 581 05

Due complainants, besides 1st instalment

3756 77

Aggregate

\$4337 82

He also reported numerous judgments of large amounts, obtained against Hull and Hopper, two of the mortgagors, after the execution of the mortgage.

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The master farther stated specially, that after a first hearing before him in respect to the account upon the mortgage, the complainants discovered new proof, which they supposed went to show a payment or discharge of the first instalment; and the master being satisfied that the discovery was made after the first hearing, he did on the day fixed by him to settle the draft of his report, and before the draft was settled, receive the new evidence which he

reported specially. It consisted of exhibits showing the following state of facts :

Hull and Hopper, two of the mortgagors, with Epaphrus Hull and John Thomas as sureties, on the 25th of October, 1826, executed their joint and several promissory note to Harvey, for \$8000. Harvey endorsed this note to Southwick, Cannon and Warren, the defendants litigant. On the 27th of December, 1827, Hull and Hopper, with Epaphrus Hull and one Gibb, executed their joint and several note directly to Southwick, Cannon and Warren for \$2525 76. These notes were given by Hull and Hopper as collateral security to Southwick, Cannon and Warren, to protect them against various advances made by them for Hull and Hopper both before and after the dates of the notes. Southwick, Cannon and Warren also held various other collateral securities against the same advances, viz., the bond and warrant of Hull and Hopper to confess judgment on the first mentioned note ; and in February, 1827, Hull and Hopper also gave Southwick, Cannon and Warren a power to sell certain boats and vessels of Hull and Hopper, before assigned to Southwick, Cannon and Warren as collateral security, giving Hull and Hopper credit for the proceeds.

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*Epaphrus Hull, the surety, who resided in the state of Vermont, died ; and according to the law of that state Southwick, Cannon and Warren were cited to appear before the court of probate of the district of Chittenden, by a certain time, to establish their claim against his estate. They appeared accordingly, and declared on the notes as due from that estate ; and the cause proceeded to a decision ; but not being satisfied with the decision of the judge of probate, they appealed to the county court of Chittenden county. This appeal was made on the 7th of March, 1828. That court referred the cause to three referees, before whom one Eldridge, the administrator of Epaphrus Hull, as respondent, and Southwick, Cannon and Warren, as appellants, were heard upon the question whether the notes were due.

On the hearing before the referees, Southwick, Cannon

and Warren, in order to show that the notes were due, brought forward a full statement of all accounts between them and Hull and Hopper. One account against Hull and Hopper, amounted in the aggregate to \$7797 25, ranging through various items, from November 15th, 1826, to August 21st, 1828. In this account were included two judgments, the interest in which Southwick, Cannon and Warren claimed as assignees. One of these judgments was under date of February 21st, 1827, and was in favor of one Hart, against Hull and Hopper, of \$228 79; and the other was under date of June 20th, 1827, in favor of Parsons against Hull and Hopper, for \$562 68, (being the same judgment now in dispute.) Other items of the account were notes; some dated before and some after the first judgment; but all previous to the judgment in question. After the date of the judgment in question, followed various charges of disbursements by Southwick, Cannon and Warren for Hull and Hopper, by way of draft and otherwise. Interest was cast on most of the items including the judgments; and the whole footed at \$7797 25.

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Then followed a credit of cash receipts from the season of 1827, on sales of lumber, &c., down to a later date, but what date precisely did not appear, of \$8118 47.

*These were the first results from the cast of the referees as the account stood allowed by them; which left, on specific debts and credits, a balance of \$321 22 against Southwick, Cannon and Warren.

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Besides the charges in the above account, the referees found that Southwick, Cannon and Warren were in advance to Hull and Hopper, to the amount of the two notes of Epaphrus Hull, which were therefore due without any deduction except the balance of \$321 22, which they at first deducted. But on review they reversed the balance on the specific account, by charging on the *debit* side a mistake of \$540. This being added, left a balance the other way, against Hull and Hopper, of \$218 78. They then reported the whole of the two notes to be due, subject to be reduced in favor of the estate of Epaphrus Hull, which

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They reported that the estate of Epaphrus Hull was insolvent; and able to pay but 10s. on the pound. This report was afterwards confirmed by the court of common pleas.

The master reported against these proceedings being evidence of a payment or discharge of the first instalment, or any part of it. He stated that he considered the proceeding in Vermont as at the instance of the administrator, to ascertain whether any part of the two notes had been paid; not as a proceeding directly between Southwick, Cannon and Warren and Hull and Hopper; and so not binding on the former.

His opinion was that Southwick, Cannon and Warren might still elect to apply the credits in the report to any part of their debits; and yet hold on to their various collateral securities, till all their claims were satisfied. He, therefore, reported that the first instalment and the judgment therefore, were still due and unsatisfied.

The defendants, Southwick Cannon and Warren, now moved to suppress or set aside all that part of the report which related to the proceedings in Vermont, as irregular, because the master had no power to grant a re-hearing. On the other hand, the complainants excepted to the report, on the ground that the first instalment was discharged, or at least partly so.

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*Both the objection and the exception were now heard together by consent.

Marsh, for the complainants.

Swetland, for the defendants, Southwick, Cannon and Warren.

COWEN, Circuit Judge. The complainants except to the result of the master's report, insisting that the first instal

ment is paid; or if not fully discharged, that no more is due than the balance of the account, in which it is included, as struck by the referees, viz. \$218 78.

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The defendants, Southwick, Cannon and Warren, resist this exception, 1. On the ground that the evidence relied on was not regularly before the master, he having no right to grant the second hearing; but 2. If otherwise, then Southwick, Cannon and Warren are not concluded by the credits in the report of the referees; and may hold them aloof, to be applied in the best manner for themselves, after seeing how their various collateral securities turn out.

Before going into the merits, I must inquire whether the master regularly received the proofs. If not, they cannot be acted upon here; and the report must be taken as conclusive that the whole mortgage money is due.

The question is whether a master, on a reference to him to take and state an account, may, after the hearing is closed, and on the day fixed by him to settle the draft of his report, but before the draft is settled, receive further evidence, he being satisfied that it was discovered after the first hearing.

It is said in Mr. Hoffman's book (p. 69,) that no further evidence can be taken, on attendance *to peruse* or *to hear* report; but the master can only hear the parties as to the propriety of his conclusions from former evidence.

The order of proceeding, as I understand it, after the hearing closed before the master, is to investigate the matters in proof before him, and draft his report; a summons then goes, signed by the master, at the instance of either party, "to peruse report," or "hear report." The object of this is, that the parties may examine the draft, taking copies if they please; and in the language of Mr. Hoffman, suggest particulars in which they think the master may have erred in his results. For the present they are to stop here. The next step is a summons "to settle the draft report;" the return of which brings us to the stage, at which the master in this case received the further testimony. Mr. Hoffman's book is relied on at the page cited, as showing that further testimony cannot be received after the hearing is closed. But he says no such thing,

unless it be made out by inference from his denying further proof when the parties come to *hear* or *peruse* the report. He denies it then, as I understand him, not as too late, but as being inconsistent with the object of the summons. The parties are then to look, and see if any inadvertent defect is yet to be supplied by testimony. And accordingly Mr. Hoffman immediately after cites Turner who says, that "in attending the warrants (summonses) to settle the draft, the respective solicitors must state to the master such alterations as in their judgment they may think expedient, and if any evidence has been omitted, it must be brought forward in strictness, before the report is settled." The very book cited against it, thus makes the production of further evidence almost a matter of course. The attendance to *peruse* or *hear*, and attendance to *settle*, are different stages, and intended for different purposes, as will be seen by the books. They all agree, or, at least, strongly imply, that evidence may be received at any proper and convenient time before the court is finally settled. (2 Mad. Ch. 507, Am. ed. of 1822. 1 Newl. Ch. 341. Blake's Ch. 230.) The books cited, all go on Thompson v. Lamb, (7 Ves. 587,) and Fearon v. Dawes, or rather Fearon v. Stephenson, (Note (2) of Beame's Orders, 260.) I should infer from these cases, that a further examination after the hearing, is, in England, pretty much a matter of course, at any proper time before the report is finally settled. Our own practice, though more strict, *will clearly warrant all that has been done here. (a) In Remsen v. Remsen, (2 John. Ch. Rep. 502,) the chancellor says, when an examination before a master is concluded, "it ought not to be opened for further proof, without *special* and *very satisfactory cause* shown." In the case before me, the cause was most special and most satisfactory. It was a total ignorance in the party, of the evidence proposed to be adduced, till after the ordinary examination had closed. I have no hesitation in saying, that if the discovery had not

(a) By the 109th of the present rules, the next step after hearing closed, is, to issue the master's warrant for settling the draft of his report; and no previous summons to see the draft and take copies is necessary.

preceded the final settlement of the draft, I would open the report, and send the matter down to the master for a re-hearing. This is done in England, even where the error in the report is owing to the party omitting material evidence within his power. True, that is on terms; as giving up the deposit, which must there be made with the registrar upon taking exceptions to the report. (*Hedges v. Cardinal*; 2 Atk. 408.) But the case cited, strongly implies, that if the testimony was out of his power, or which is the same thing, his knowledge, the order to re-hear would be on terms much less rigorous. The master has, indeed, here done no more than he would have been directed to do, on application, had he refused.

The testimony reported is accordingly received.

2. On looking over that testimony, it will be perceived that the question arising upon it, is the much litigated one of the application of payments made to a creditor who holds a list of demands against his debtor, which demands differ in their rank, and in their penal consequences to the debtor.

I agree with the counsel for the defendants, that the proceedings in Vermont, not being directly between Southwick, Cannon and Warren, and their debtors, Hull and Hopper, and the latter not standing in the relation of privies to that proceeding, it is not such a judicial proceeding between the parties as would work a technical estoppel, even were the debtors now before the court insisting on such an effect. Much less can it be relied on in that view by the complainants, who were utter strangers to that proceeding. It could neither be pleaded nor given in evidence, as an estoppel, in bar to an action on account, or any part of it. Nor does the view which I have finally felt myself constrained to adopt, require that I should consider the part which Southwick, Cannon and Warren took in those proceedings as an act *in pais* amounting to an application of the various payments to the specific account. This was the ground taken by the counsel for the complainants; and there is certainly much argument in its favor. Southwick, Cannon and Warren urged two ac-

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counts before the referees in Vermont; one was a general or round estimate; at least appears to be so here, for the items are not given. It equalled the notes, and they were claimed on the foot of that general estimate, as a collateral security by these defendants, and were maintained by the referees as such, and declared to be entirely unpaid. The other account was specific, being set forth item by item, and included the judgment for the instalment in question. The whole accounts amounted, say (for the sake of round numbers) to \$19,000. On this account \$8000 were received; and were to be credited. The debtors had not directed the application when they made the payment; and I will take the rule at present, as broadly as it was contended for by the complainants' counsel; that the creditors might make the appropriation of the payments at any indefinite period of time. They did present them as credits by the side of the specific account. They were so placed upon the report of the referees, which Southwick, Cannon and Warren accepted, and procured to be confirmed. They (S. C. & W.) did not, as I have supposed they might have done, make a general appropriation to the whole amount of \$19,000, but they adopt a report, apparently making it on a specific part of that account, very nearly corresponding in amount with the credits, and doubtless so intended by them. They do not keep these credits away from the judgments; but make the latter a part of the specific account. On the ground now taken they had the power to declare what part of their whole account was due; and they elected the general account as due; and, having done so, the specific account must stand paid as far as the credits will go. The money paid must stand credited to something; and they surely do not want their collateral securities to protect what is actually paid. That is extinguished. They could not, if desirable to them, *keep the moneys received in payment floating about, to sink at their will, upon the most commodious part of their account, in reference of the final avails of their collateral securities, or the nature of their different debts. In this view, \$218,78 of the specific account would

still remain due ; and giving the defendants their indefinite latitude of application, they might now so apply the credits to that account as to leave so much of the instalment in question due and unpaid ; that is to say, they might now apply the payments to other parts of the specific account, withdrawing the judgment in question as to the undischarged balance. Giving the defendants that ground, therefore, they might still claim the \$218,79.

But this is perhaps not the true ground upon which to dispose of the case. It is true, as the defendants' counsel insists, that they were called into the court of probates to maintain their notes ; and they did this by showing a balance of general account equal to the notes. It is the fairest construction they can ask ; and I am disposed to give it to them. We then allow their whole account, as far as the law will permit, to stand. That account, as far as can be gathered from the reported testimony, consists of the two judgments of about \$800 ; and several promissory notes and matters properly chargeable in account, amounting, we have supposed, to \$19,000. About \$8000 have been paid upon general account. Neither the debtors, when they made their payments, directed, nor have the creditors made any specific appropriation ; and they refuse to make it, up to this moment. They claim to use the payments as a kind of deposit in their hands, to make up for the ultimate failure of their pending collateral securities. If the mortgage fails to pay the judgment, they may then be under the necessity of applying part of the \$8000 to that debt, and keeping it away from other items of claim which are otherwise secured. If the mortgage shall pay the judgment, all the \$8000 go to other parts of the account, and so on. They thus insist on holding in their hands a shifting payment, a kind of *corps de reserve*, to be ordered up to the weakest point as the occasion shall demand. I am strongly inclined to think the creditors do not possess this power ; but that where they neglect an appropriation, the law will step in and appropriate the payment for them ; though, I confess, I have come to this conclusion with some diffidence, and the more so, inasmuch as the learned counsel did not

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go so fully into this branch of the subject as its materiality and importance appear to me to have demanded. The point was mentioned at the bar; but no authorities were cited either way.

It is certainly well settled, as a general rule, that if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he, (the payer) has a right to say to which account the money so paid shall be appropriated; (*Bois v. Cranfield*, *Styles*, 239; *Anon. Cro. Eliz.* 68; *Pinnel's case*, 5 Rep. 117; and almost every case which I shall hereafter cite;) provided he declares, at the time of payment, the purpose for which it is made. But if he does not the payee may direct how it shall be applied. (*Manning v. Weston*, 2 Vern. 606. *Amen*, 8 Mod. 236. *Bowes v. Lucas*, Andr. 55. *Goddard v. Cox*, 2 Str. 1194. *Mann v. Marsh*, 2 Caim. Rep. 99; and many of the cases which I shall hereafter cite. And vid. *Simson v. Ingham*, 2 B. & C. 65.)

In *Peters v. Anderson*, (5 Taunt. 596,) it was held that the creditor might appropriate at a future day, and, it seems, at the time of bringing his action, and that he is not tied down to make the appropriation immediately, like the debtor. The same doctrine is sanctioned by *Goddard v. Cox*, (2 Str. 1194,) *Wilkinson v. Sterne*, (9 Mod. 427,) and by the ruling of *Thompson, baren*, in *Newmarch v. Clay*, (14 East, 239.)

In *Clayton's case*, a subdivision of that of *Devaynes v. Noble*, (1 Mer. 606,) Sir William Grant, master of the rolls, considers these cases as invading the rule of the civil law. That rule is, that where no application was made either by the debtor or creditor at the time, the law will make the application upon the presumed intention of the debtor. He thinks we borrowed the rule from the civil law which we have extended much beyond its original meaning. On the other hand, he admits there are cases utterly irreconcilable with this indefinite right of election in the creditor, and which come back to the rule of the civil law. Among these *he ranks *Meggott v. Mills*, (1 Ld. Raym. 287,) and *Dawe v. Holdsworth*, (Peak. N. P. Cas.

64.) The right of the creditor to elect *ex post facto* was denied in both these cases ; and he considers the cases, on the whole, as setting up two conflicting rules. He confesses himself embarrassed, and waives further inquiry into the rule, thinking the case before him was not touched by it. That was the case of a running banker's account. Clayton had made deposits with, and drawn checks in the usual way, on Devaynes and others, who were partners in the banking business. Devaynes died when there was a balance due Clayton of £1713. Immediately after Devaynes' death, Clayton, without any additional deposits, drew for and received £1260 of the survivors, leaving £453 still due from the old firm. Afterwards he paid to, and drew considerable sums from the surviving partners, who pursued the former business. His drafts on them were much beyond the balance of £453. The surviving partners becoming insolvent, a bill was filed to charge Devaynes with the whole £1713 as still due, though it was much over drawn, if the payment of checks after Devaynes' death was to be applied to his debt. The decision went finally on the whole being a blended banker's account both before and after Devaynes' death, and upon the course of business and understanding of the parties in respect to such accounts ; wherein the oldest deposit is always met by the oldest draft. And the master of the rolls said the very form of keeping the account by a banker is a sufficient appropriation. The whole debt of Devaynes was therefore holden to be discharged. (Bodenham v. Purchas, 2 B. & A. 45, S. P.) Thus it would seem at this day to be unsettled in England, whether the creditor, on the debtor's default, can make the appropriation, in all cases, at any time after the payment ; whether he must not, at least in certain cases, do it presently. The master of the rolls felt a difficulty in pronouncing whether the rule of the civil law was to be followed, or taken with its extension in favor of the creditor. He truly remarks, that in *Meggot v. Mills* Lord Holt adopted the reasoning of the civil law, and *Dawe v. Holdsworth* went upon that case. *Peters v. Anderson*, the court thought these two cases proceeded on the pre-

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sumed intention of the debtor *to impute the payment to the particular debt of the two upon which he could be made a bankrupt, so as to avoid that criminal or inconvenient consequence. But this does not get rid of the civil law rule, which in the absence of a present appropriation by either party, adopts the presumed intention of the debtor, and makes an application most beneficial to him. There is no adjudication in this state to govern me. The doctrine is glanced at by the present learned chief justice in *Baker v. Stackpoole*, in giving the opinion of the court of errors (Dec. 1827, M. S. ;) (b) but he follows Sir William Grant, passes it by, and rests the case in hand on other principles; the debt to which the creditor was there struggling to apply the payment, had not accrued when the payment was made.

How then stands the real weight of English authority on this question? How much of the civil law doctrine is left to us? I am inclined to think that where one owes two debts to another, upon the face of which it must be altogether indifferent to the debtor how the money shall be applied, there a general payment may be applied by the creditor, at any time, to which debt he pleases. (*Bosanquet v. Wray*, 6 Taunt. 597.) Such was the case of *Peters v. Anderson*. There the defendant was indebted on a covenant to pay wages, and on a subsequent simple contract to pay wages, to the same creditor. Several general payments were made, and the creditor was allowed to appropriate them to each debt as he pleased. (*Goddard v. Cox*, 2 Str. 1194. *Bloss v. Cutting*, cited 2 Str. 1194, 5, S. P. *Nemarch v. Clay*, 14 East, 239, S. P. *Plomer v. Long*, 1 Stark. 153, S. P.) On the face of the matter, in *Peters v. Anderson*, it was at the time equal to the defendant, whether he paid on the first or the last contract. Beyond this, I think the weight of authority is in favor of the civil law rule, although it must be admitted that it is impossible to reconcile the cases. *Manning v. Westerne*, (A. D. 1707,) is directly against that law. The defendant owed the plaintiff an old demand without interest, and a younger carrying

(b) Since reported, ante, 420.

interest; and the plaintiff was allowed to apply a general payment *to the first; or rather the court so applied it. (Rathby's Vern. 607, note (1,) giving the decree from the register's book.) So in the anonymous case (8 Mod. 236, A. D. 1724,) the plaintiff was allowed to apply an indefinite payment to his account, instead of his judgment against the defendant. *Bowes v. Lucas*, (Andr. 55, A. D. 1737,) is perhaps the same way, though more doubtful. The defendant, as administrator, owing rent which had accrued, both before and after his intestate's death, on a lease to his intestate, the administrator being in possession, made a general payment to the lessor, and would have applied it to the last rent; but the landlord was allowed to apply it to the first.

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Now the civil law rule would, as I before remarked, have made an application most beneficial to the debtor. "The payment (says Sir William Grant, in Clayton's case, 1 Mer. 606,) was consequently applied to the most burthen-some debt; to one that carried interest, rather than to that which carried none; to one secured by penalty, rather than that which rested on simple stipulation, and if the debts were equal, then to that which had been first contracted." "In his *quæ præsentī die debentur, constat, quotiens indistincte quid solvitur, in graviolem causam videri solutum, si autem nulla prægravit; id est, si omnia nomina similia fuerint, in antiquiolem.*" (Dig. L. 46, t. 3. Qu. 5.) The original rule, with all its various illustrations, may be seen in 1 Ev. Poth. 368 to 376, the whole of art. 7; Rules for the application or imputation of payments.

I have given such English cases as I could find which forbid me to apply the doctrine of the civil law to the principal case. I feel confirmed that there are none beside, by the failure of the counsel for Clayton, in *Devaynes v. Noble*, to find any others which could be plausibly turned against that doctrine.

Cases the other way are more numerous; and they range themselves, in the order of time, on both sides of those cited against the rule. In *Prowse v. Worthing*, (2 Brownl. 107, 8, A. D. 1611,) it is said, "If debt be due by obliga-

tion, and another debt be due by the same debtor to the same debtee of equal sum, and the debtor pay one sum generally, this shall be intended payment upon the obligation." In *Heyward v. Lomax*, (1 Vern. 24, A. D. 1681,) a man owed one money on a mortgage and also on account. Held that a general payment should go on the mortgage "because it is natural to suppose that a man would rather elect to pay off the money for which interest is to be paid, than the money due on account, for which no interest is payable." In *Chase v. Box*, (2 Freem. 261, A. D. 1702,) it was said by the lord keeper, in analogy to the familiar rule, that a payment goes first to reduce the interest, that where a man owes another on bond carrying interest, and also book account, a general payment shall be applied first to pay the book debt. "But this was denied at the bar, because when a man payeth money, it shall be applied as he intends that pays it; and therefore where both parties are silent, it shall be intended in discharge of that which is most beneficial to him that pays it; and that shall be to sink the debt that carries interest; and said there were precedents for it." The report says it was held by the lord keeper; but the principal case appears to have been on the single question, now so well settled, whether money paid on a debt shall go first to the principal or interest. The remark on the two different debts, so very anomalous, I rather choose to consider a mere *dictum*, thrown out by the lord keeper, but immediately corrected at the bar, and the correction probably acquiesced in, for the time, by the judge. The earlier case of *Meggot v. Mills*, (1 Ld. Raym. 286, A. D. 1697,) has been already mentioned. Holt, Ch. J. there says, "If A., being a trader, becomes indebted to B., in £100, and then he quits his trade, and afterwards becomes indebted to B., in £100 more, and afterwards A. pays to B. £100, not expressing upon what account; since so much in quantity is paid to B., as was due to him from A., when A. was capable of being a bankrupt, it would be too rigorous to admit B. to sue a commission of bankrupts for the old debt of £100." He said he would not give an absolute opinion; but what he said was not questioned by the other

judges of the K. B. who all sat with him. This is evidently the same case with that reported as anonymous in Cumberbach, 463, who speaks of the point as ruled by Holt, Ch. J., without any reserve made. In *Dawe v. Holdsworth*, (Peak. N. P. C. 64, A. D. 1791,) before Lord Kenyon, it appeared that one Pittard was a trader in 1785, and became indebted to a creditor in £200. There were afterwards other dealings between them, Pittard again becoming indebted to his creditor in more than £200, and paying him money generally to more than that amount; but not enough to discharge both claims, the balance due on both being still £200, and upwards. Lord Kenyon placed the payments to the old debt first. In an anonymous case, (12 Mod. 559, A. D. 1707, in B. R.,) it was held that if one owes £40 by bond, for the payment of £20 at such a day, and £20 by contract to the same person, payable at the same day; and at the day he pays £20, without telling for which it is, it shall be a payment in equity upon the bond, because that is the most penal upon him.

Now, before we look into the reports of this country; it is worthy of remark, that not only is the rule itself, as to the relative power of debtor and creditor in the application of payments, clearly brought over from the civil law; but the whole list of cases just cited, exhibit the most distinct features of, and, as far as they go, travel *pari passu* with the corollaries of that law in respect to the applying of indefinite payments. This will be seen at once by looking into the head before quoted from Evans' Pothier. In *Gwinn v. Whittaker's Admr.* (1 Harris & John. Mar. Rep. 754, 5, A. D. 1805,) Chase, Ch. J., treats the doctrine of these cases as the settled law; and does not take pains to cite a single authority in its support. He says, generally that he considers the following principle as established by the judgments of the courts of Maryland, and in harmony with the English decisions: "If the debtor is indebted on mortgage and simple contract, or on bond and simple contract, and when he makes a payment, should neglect to apply it, the law will make application of it in the way most beneficial to the debtor, that is to the mortgage or

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bond." In *Dorsey v. Gassaway*, (2 Har. & John. 402, 411, 412, A. D. 1809,) the same point as between a mortgage and a subsequent open account, was directly settled by the general court, and affirmed on appeal.

*In *The United States v. January*, (7 Cranch, 572,) Same v. *Kirkpatrick*, (9 Wheat. 720,) and *Cremer v. Higginson*, (1 Mason, 323,) the two first cases in the supreme court of the United States, and the last in the first circuit of the United States, the respective powers of the debtor and creditor in the application of payments are recognised as they are settled both by the civil and the common law. These cases bear no immediate relation to the one I am considering; but *The United States v. Kirkpatrick*, is important as limiting the power of the parties to make the application, to some point of time before the controversy has arisen, or at least before the trial. Mr. Justice Story, who delivered the opinion of the court, observes, that if both parties omit the application, the law will make it according to its own notions of justice. The only illustration called for (and in this the court concurred) was, that in cases like the one then before them, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments should be applied to extinguish debts according to priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due. In this the learned judge fell into the civic law rule. (1 Ev. Poth. 374.) I have been thus particular in noticing this case, because I think it not precisely in harmony with a previous case in the same court; that of *Field v. Holland*, (6 Cranch, 8, 14, 27,) so far as the latter relates to the application of payments. There were a judgment and other demands; and the court held that equity might apply general payments so as to extinguish the other demands first, inasmuch as they were not so well secured; and it was proper to consult the advantage of the creditor, not the debtor. This was done accordingly. The case is directly at antipodes with the civil law; and *The United States v. Kirkpatrick* is no further inconsistent with it, than as adopting

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a principle of that law which goes upon priority of time rather than the advantage of the debtor. In neither of these cases do the books appear to have been consulted. There is no English case, that I have been able to find, which prefers the advantage of the creditor in an application *by act of law, unless it be the solitary one of Manning v. Westerne, before noticed; but, as I have shown, again and again overruled. The anonymous case in 8 Mod. 236, was an application by the creditor; and I am persuaded that had the attention of the learned chief justice, who delivered the opinion of the court in Field v. Holland, been drawn to the great preponderance of authority the other way, his conclusion would have been the same with that of the court in Maryland.

At an early stage of this investigation, I felt it difficult to resist that conclusion, upon the English cases; though, as I before remarked, I could not be perfectly confident; and my diffidence was increased by seeing such men as Sir William Grant and Ch. J. Savage, with most of those cases before them, start from the question as one profoundly vexed, and avoid an opinion until it should become absolutely necessary to express one. But I feel my conclusion so much fortified by the repeated and solemn decisions of the courts in Maryland, that I can no longer hesitate how to apply the payments by Hull and Hopper, to their creditors, Southwick, Cannon and Warren.

We have seen that in virtue of the assignment of the first instalment by Pattison and Vails, to Southwick, Cannon and Warren, Hull and Hopper became both judgment and mortgage debtors, *pro tanto*, to the assignees. These debtors owing the same creditors other large sums of money on various accounts, but mostly on simple contract, make general indefinite payments to their creditors amounting to many thousand dollars beyond the judgment and mortgage debt; and I infer from the evidence, that they received more than sufficient to satisfy this debt, after they had taken the assignment. The creditors say they never have made any appropriation of the money paid. It must, as I suggested before, be applied somewhere; and cannot be holden

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as a deposit; (*Hammersley v Knowlys*, 2 Esp. Rep. 666, 7, per Lord Kenyon;) and the law will apply enough of it at once to extinguish the judgment and mortgage debt for ever. It will do this within the principle of the civil law and the English cases; that such an appropriation is more beneficial to the debtors than "an appropriation of it on the other demands of inferior consequence to the debtors, though such other demands are large enough to exhaust the whole of the payments, and leave the particular debt yet due. That debt not only ties up the lands of Hull and Hopper by both a general and specific lien; but execution may go upon it against their goods or bodies. *Hayward v. Lomax* and the two cases decided in Maryland are directly in point. In this view, the decree must be in favor of the complainants, whether there has been an application of payments to the specific account before the referees in Vermont, or not; because, though applied by the creditors to the specific account, the law will select, and, as between the items of that account, extinguish the judgment and mortgage debt first.

I, therefore, hold the first instalment satisfied; and the exception to the master's report is allowed. (b)

(b) On the head of the *appropriation*, or as continental writers would say the *imputation* of payments, it is matter of curiosity as well as instruction, to see, how nearly English judges have followed the Roman lawyers, without acknowledging it. As it cannot be supposed they did so unwittingly, we must probably set down their silence to that inveterate hatred by which their nation has long been characterized, towards the civil law. A little more liberality on this head, a simple reference to the ground on which the early decisions were founded, would doubtless have prevented that singular discrepancy which their cases exhibit. Numerous and ancient as those cases are, the digest was not cited by either counsel or court till the decisions of *Devaynes v. Noble*, (July, 1816.) The master of the rolls is, in that case, left to infer the origin of our rule from the striking similarity between the text of the civil and common law. When the English courts, in default of the parties, have been left to apply the payments, they have, (says *Bevens* in his commentary on *Pothier*), "in several cases directed an application, from the circumstances of the case, nearly correspondent with the rules in the text." (Pothier's text commenting on the civil law.) Vid. *Ev. Poth.* 369, note (a).

A moment's recurrence to the civil law will convince the learned reader how much we have borrowed from it almost without credit. The whole text of that law, in relation to the subject under consideration, is contained *pas-*

The question on which this case has turned is a vexed one, and I do not think I shall give costs either way. (*Staines v. Morris*, 1 Ves. & Bea. 8.) But that point may stand reserved till the coming in of the corrected report.

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sim in the Digest, (Lib. 46, tit. 3, *De solutionibus et liberationibus*;) as is rendered into English by *Straham* from the French of *Domat's civ. L.* in its natural order, as follows:

"1. If a debtor who owes to a creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichever of them he pleases; and the creditor cannot refuse to receive payment of it; for there is not any one of them which the debtor may not acquit, although he pay nothing of all the other debts, provided he acquit entirely the debt which he offers to pay."

This is precisely the common law: Owning two debts to the same person, you may pay which you please, but you must tender the whole debt. The creditor is not bound to take part of it, though he may do so if he choose. (22 Ed. 4. 252. Br. Condition, pl. 191. *Loft's Gift*. 330. *Phmel's case*, 6 Co. 117. *Colt v. Netherville*, 2 P. Wm's. 304. *Anon. Cro. Elis.* 68.) *Hawkshaw v. Rawlings*, (1 Str. 23,) that the debtor shall not apply the money, is not law. There are 15 or 20 cases the other way.

"2. If, in the same case of a debtor who owes several debts to one and the same creditor, the said debtor makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge, whether it be that he gives him a sum of money indefinitely in part payment of what he owes him, or that there be a compensation [*i. e. a set-off*] of debts agreed on between the debtor and creditor, or in some other manner, the debtor will have always the same liberty of applying the payment to whichever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he himself would discharge in the first place, in case he were the debtor, for equity requires that he should act in the affair of his debtor, as he would do in his own. And if for example, in the case of two debts, one of them were controverted and the other clear, the creditor could not apply the payment to the debt which is controverted by the debtor."

The right of the debtor to apply the payment, whether total or partial, if he do so at the same time, is recognized by all the cases. As the above doctrine restraining the creditor to an application most favourable to the rights of the debtor, one cannot read the case of *Goddard v. Cox*, (2 Str. 1194,) without being struck with the similarity both in principle and illustration. The defendant owed the plaintiff three debts, one he contracted himself, a second he owed absolutely in right of his wife, and the third was due from his wife as executrix. The defendant made several indefinite payments, after which his creditor sued him. Chief Justice *Lee* held the hold of the above civil law doctrine: 1. It was agreed the defendant had first right to apply the payments; 2. The chief justice held, there being no direction by him, that thereby the right devolved to the plaintiff. And the defendant owing by the marriage equally a debtor for what his wife received *done sola*,

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Hull.

The corrected report now coming in,

Saratoga
Springs, Sara-
toga County,
July 29th,
1829.

Marsh, for the complainants, moved for an order of foreclosure and sale, with costs.

Swetland contra.

D. Gardner, in reply.

The argument was confined to the question of costs.

as for what was after, the plaintiff might apply the money received to discharge the wife's own debt. "But as to the demand against her as executrix, the validity of which depended on the question of assets, and manner of administering them; he was of opinion the plaintiff could not apply any of the money paid by the defendant to the discharge of that demand."

"3. In all cases where a debtor, owing several debts to one and the same creditor, is found to have made several payments, of which the application has not been made by the mutual consent of the parties and where it is necessary that it be regulated either by a court of justice, or by arbitrators, the payments ought to be applied to the debts which lie heaviest on the debtor, and which it concerns him most to discharge. (12 Mod. 559. 2 Brownl. 107, 8. 1 Vern. 24. 2 Freem. 261. 1 Ld. Raym. 286. 1 Comb. 463. Peak. N. P. Cas. 64.) Thus a payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, and to cost and damages, (12 Mod. 559, 2 Brownl. 107, 8, 1 Vern. 24, 2 Freem. 261, 1 Ld. Raym. 286, 1 Comb. 463, Peake. N. P. Cas. 64, 1 Har. & John. 754, 2 id. 402, 8 Mod. 236,) or in the payment in which his honor might be concerned, than to a debt of which the non-payment would not be attended with such consequences. Thus a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security; (*Mayratts v. White*, 2 Stark. Rep. 101; *Plomer v. Long*, 1 id. 153, contra;) or to the discharge of what he owes in his own name, rather than what he stands engaged for as surety for another. Thus a payment is applied to a debt for which the debtor has given pawns and mortgages, rather than to a debt due by a simple bond or promise: (1 Vern. 24: 1 Har. & John. 754; 2 id. 402;) rather to a debt of which the term is already come, than the one that is not yet due, (*Hammersly v. Knowlys*, 2 Esp. Rep. 666: *Niagara Bank v. Roosevelt*, per Woodworth, J., ante, 412; *Baker v. Stackpoole*, per Savage, Ch. J., ante, 436,) or to an old debt before a new one: (1 Meriv. 608;) and rather to a debt that is clear and liquid, than to one that is in dispute, (*Goddard v. Cox*, 2 Str. 1194,) or to a pure and simple debt before one that is conditional. (id. and ante, 412.)"

*COWEN, C. Judge. My impression was so strong that costs ought not to be given either way, that perhaps I ought to have told the counsel so, and prevented a formal argument upon the question. As this cause stood when it was first moved, my inclination was with the defendants

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I have here interpolated the common law cases in the text of the civil law. On examining them, it will be found that almost every word of the last quotation has been expressly sanctioned by the English courts.

"4. When a payment made to a creditor to whom several debts are due, exceeds the debt to which it ought to be applied, the overplus ought to be applied to the discharge of the debt which follows, according to the order explained in the preceding article, unless the debtor makes another choice."

This follows of course from principles before stated.

"5. If a debtor makes a payment to discharge debts which, of their nature bear interest, such as treat of a marriage portion, or what is due by virtue of a contract of sale, or that the same be due by a sentence of a court of justice, and the payment be not sufficient to acquit both the principal and the interest due thereon, the payment will be applied in the first place to the discharge of the interest, and the overplus to the discharge of a part of the principal sum.

"6. If in the cases of the foregoing article, the creditor had given an acquittance in general for principal and interest, the payment would not be applied in an equal proportion to the discharge of a part of the principal and of a part of the interest, but in the first place all the interest due would be cleared off, and the remainder would be applied to the discharge of the principal."

The two last paragraphs contain a doctrine perfectly naturalized by all our cases, from *Chase v. Box*, (2 Freem. 281,) to *State of Connecticut v. Jackson*, (1 John. Ch. Rep. 17,) and *vid. Stoughton v. Lynch*, (2 id. 209.) *Vid. also* Hening's ed. of *Maxims in Law & Equity*, App. 1 to Francis' *Maxims*, pp. 106, 108, 113, and the cases there cited. Also *Williams v. Houghtaling*, (2 Cowen, 86 & 87, 8, 9, note (a) with the cases there cited.)

"7. When a debtor obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages, which he engages for the security of all the debts, the money which is raised by the sale of the pawns and mortgages, will be applied in an equal proportion to the discharge of every one of the debts. (*Perry v. Roberts*, 2 Ch. Cas. 84, somewhat similar in principle.) But if the debts were contracted at divers times upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the pledge, after payment of the first, the moneys arising from the pledges would, in this case, be applied in the first place to the discharge of the debt of the oldest standing. And both in the one and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid before any part thereof be applied to the discharge of the principal."

This paragraph contains the familiar doctrine of priority of pledges; and

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(S. C. & W.) throughout. I could not bring myself to doubt that they were assignees of the mortgage as well as of the debt; that they combined the character both of mortgage and judgment creditors. What relief I should have given them, I cannot say: but had the cause preserved the shape it then held, some relief must have been extended adverse to the interest of the complainants. Admit that this might have been without costs, on account of the question having been fairly litigated by the complainants; the cause then goes into the master's office for an account. There a constructive payment of all the defendants' claim is set up; the master disallows it on the point of law; it comes here by exception; and after a good deal of investigation, I draw a different conclusion; and allow the exception. This is on a point, too, about which English and American chancellors and judges have differed or doubted. I found two cases directly contradictory in the same book (Vernon) within a few years of each other. The allowance of costs is a matter of discretion; and in applying that discretion, I felt that I could not escape the case of *Staines v Morris*, which I referred to at the close of my opinion upon the exception, and then pointed out to the complainant's counsel. Supposing that the costs were large, and forming

follows out the corollary of applying partial payment to discharge interest in the first place. The proposition that a payment on pawns, &c. for simultaneous debts shall be distributed between the two debts, has never been exactly adjudged with us, though the case interpolated is about the same in principle. And see what Holt, Ch. J. says in *Styart v. Rowland*, (2 Show. Rep. 216.)

The above is the entire text of the *corpus juris civilis* relative to the application or imputation of payments. The commentators on that law (among whom Pothier is the best known and most popular with us) furnish various additional corollaries, several of which have also been adopted by courts proceeding according to the course of the common law. The remark of Sir William Jones, that the greatest portion of Pothier on express and implied contracts is law at Westminster as at Orleans, (Jones on Bailm. 30,) justifies more strongly the parallel I have attempted in this note between the civil and common law. In this respect, Pothier has done little more than Domat. All he has added to a translation of the civil law into French, are a few very natural deductions rising almost mathematically from the text. (Vid. Poth. du Contr. pt. 3, ch. 1, art. 7, between which and the common law, vid. a partial parallel, 1 Ev. Poth. 368 to 376, *passim*.)

perhaps now the heaviest item *of controversy in the cause, I suffered the argument to proceed. The whole merits have been gone over by counsel, to see whether the parties have been fairly litigating, and so come within the principle of the case cited. The lord chancellor there said, "where there is a fair case for consideration it is not the course to visit the party who fails with costs." And after adverting to the facts, that he had differed from the master; and that the judges would not decide the case without the opinion of the court of chancery, and that professional men had differed upon the question, he concludes, "It would be too presumptuous in me to set such a value upon my own opinion, as to mark the resistance of the defendant with costs."

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*Much has been said about the unconscientious character of this defence as grounded upon the legal effect of the assignment; that it was contrary to the real understanding of the parties, and that sound morals will not justify it. All this is said upon the parol evidence, which I felt bound to lay out of view in considering the merits; and I cannot take it up on disposing of the question of costs. On reading that evidence, I am free to confess, I was afraid that all this expensive litigation had grown out of a mere slip of the pen; but even in respect to that question, much can be and much was said on both sides. A jury might have honestly decided either way upon it.

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The course of the court is uniform, where the question raised is a fair one, and difficult for the parties to settle themselves, not to give costs against the unsuccessful party. (*Anon.*, 3 Atk. 295. *Nourse v. Finch*, 1 Ves. jun. 362. *Perry v. Whitehead*, 6 Ves. 554. *White v. Foljambe*, 11 Ves. 337. *Vancouver v. Bliss*, id. 458. *Staines v. Morris*, 1 Ves. & Bea. 8. *Hampson v. Brandwood*, 1 Mad. Rep. 381, *O'Donel v. Browne*, 1 Ball & Be. 264.)

Costs are denied as between these parties.

Decree accordingly.

The People
v.
Shall.

MONTGOMERY OYER AND TERMINER, November 17th, 1829.

THE PEOPLE *against* SEBASTIAN I. SHALL.

The forgery
of a writing
purporting to
contain a mere
naked promise
to pay a sum
of money in
labor, express-
ing no consid-
eration, and
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being connect-
ed with no
consideration
by averment
in the indict-
ment, is not an
indictable
crime.

Forging any
instrument or
writing which
it appears on
the face of the
indictment
would have
been void, if
genuine, is not
an indictable
crime.

A promise
in writing un-
sealed, not for
the payment of
money, is void,
unless it either
express a con-
sideration, or
some consid-
eration be
shown by
averment

Before { ESEK COWEN, Circuit Judge,
AARON HARDING, First Judge, } of Montgomery
HENRY I. DIEFENDORFF, Judge. } county courts.

At the last oyer and terminer, holden in Montgomery county, (May, 1829,) the defendant was convicted of forg-
ing *an instrument which was set forth in the indictment
as follows: "A certain promissory note of hand, which
said note has been and is lost, and the tenor and substance
of which said false, forged and counterfeited note is as fol-
lows, that is to say: 'Three months after date, I promise
to pay Sebastian I. Shall, or bearer, the sum of three dol-
lars, in shoemaking, at cash price; the work to be done at
his dwelling house, near Simon Vrooman, in Minden. Min-
den, August 24th, 1826. David W. Houghtailing;' with
intent to defraud the said David W. Houghtailing."

There was also a count for uttering and publishing the
same instrument as true, knowing it to be forged, with the
like intent to fraud.

The indictment contained no averment of any extrinsic
matter which could give the instrument forged, allowing it
to have been genuine, any force or effect beyond what it
bore on its face.

A motion was immediately made in arrest of judgment,
the decision of which was suspended until the present term,
for the purpose of looking into the cases; the defendant in
the mean time being out on bail.

D. Cady, for the motion.

W. I. Dodge, (dist. att'y,) contra.

COWEN, Circuit Judge, now delivered the opinion of the
court. I still have to regret that this motion did not take
the course which I suggested when it was moved, of a cer-

tiorari to the supreme court, and a decision by that forum. But counsel did not think the matter of sufficient importance to trouble that court with ; and it becomes our duty to pass upon it here.

It is scarcely necessary to observe that the instrument set out in this indictment, is not a promissory note within the statute of Anne : and it is agreed that the writing does not come within any of the statutes of forgery ; it being payable neither in money nor goods, but labor. (1 R. L. 404, 5.) The indictment is, therefore, based upon the common law. *Another defect renders it utterly void, of itself, as a common law contract. It expresses no value received, nor any consideration whatever ; and no action could be maintained upon it, if genuine, as a special agreement to perform labor, without averring and proving a consideration, dehors the instrument. (Carlos v. Fancourt, 5 T. R. 482. Lansing v. McKillup, 3 Caines, 287.) The indictment avers no extrinsic fact by which it might be made operative : nor is it conceivable how matter for such an averment could exist.

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The question presented is, whether the fraudulent making of a writing void in itself, and so appearing in the indictment, be the subject of a prosecution for forgery. That it may be we are referred, through Chitty's Criminal Law, to what was said in Rex v. Ward, (2 Ld. Raym. 1461, 1466, 1469,) that the fabrication of an instrument, whereby another *may be defrauded*, is forgery. The information in that case stated that Ward, being chargeable to deliver 315 1-4 tons of alum to Duke Edmund, fabricated a schedule, and endorsed upon it a direction to himself in the name of the duke, to charge 660 1-4 tons of alum to the duke's account, part of the quantity mentioned in the schedule ; and, out of the proceeds of sales of alum in Ward's hands, to pay himself £10 for every ton according to agreement, and for so doing the endorsement should be his (Ward's) discharge. This was holden forgery at common law. In answer to an objection taken in arrest, that no publication of the instrument, or actual fraud upon the duke, was averred in the information, the court said that the crime was

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complete by the act of forgery ; publication or actual fraud were not necessary ; but it was sufficient that the duke might have been defrauded. An objection in arrest was also taken that the statement of the *onerabilis existens ad deliberandum*, did not lay the time so as to connect it with the instrument forged. The time was holden sufficiently certain ; and the information was sustained against every objection. One remark suggested by this case is, that the instrument would have been void in itself ; and the averment of *onerabilis existens* became necessary to complete the crime. Otherwise the duke could not possibly have been imposed upon ; and he was the only person *stated in the information to be the object of the fraud. It is plain, too, that such an instrument could have had no legal effect, and could have imposed upon no one, if none of the duke's alum had been in Ward's hands.

Ward's is a leading case. It underwent great examination ; and in the course of the discussion, almost every authority upon common law forgeries, then extant, appears to have been considered. The cases referred to were these ; *Rex v. Stocker*, (5 Mod. 137, 1 Salk. 342;) forgery of a bill of lading ; *Roy v. Ferrers*, (1 Sid. 278;) forging the acquittance of a prosecution by Lady Grantham, there being several suits between them ; Farr's case, (Sir T. Raym. 81;) forging a warrant of attorney ; Dudley's case, (2 Sid. 71;) forging a marriage register ; *Le Roy v. Deakins*, (1 Sid. 142;) forging a protection in the name of Sir Anthony A. Cooper, who was of the privy council, but not a nobleman. It was objected, that because he was not a nobleman nor member of parliament, the protection was void, none but nobles or members having power to grant such an instrument ; and so no one could be imposed upon. The objection was overruled, doubtless on the ground that the defect was latent. It did not appear upon the face of the paper, which purported to be a valid one. *Domina Regina v. Yarrington*, (1 Salk. 406,) was the forgery of a letter ; and the judges, in Ward's case, refer to manuscript cases of common law indictments, for forging a general release and a bill of exchange ; and Fortescue, justice, mentioned

a similar indictment for forging the endorsement on an army debenture. (2 Ld. Raym. 1465.) In Savage's case (Styles' Rep. 12,) the defendant "was indicted for forging and publishing of letters of credence to gather money; and was convicted, and judgment given against him upon his own confession, and £100 fine set upon him." Of Roy v. Ferrers, it is proper to observe, that I have have looked into 1 Tremaine's Entries, fol. 129, where the indictment is set forth in full; and I find that, in order to show the application and effect of the forged acquittance, a real demand is recited, which the acquittance purported to discharge. This was evidently necessary, or the instrument would have been no more than blank paper. In all these *cases, the instruments forged were, as far as we can see, apparently available for the purpose intended; to acquire or defeat some right, or to work a prejudice; and we have seen that, in two of the cases, the papers not being prejudicial on their face, the defect is supplied by averment or recital, showing how they might be made to act injuriously by reason of matter *aliunde*.

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I now come to a class of cases which hold that a writing void of itself, and not made good by averment, is not the subject of a prosecution for forgery. In Wall's case (2 East's P. C. 953, and note (a) and (b)) the conviction was on an indictment for forging a will of all the premises belonging to J. S., which he bought of T. W. & S. H. The will was attested by only two witnesses; and was therefore void as a devise of a freehold; but would have been good as a bequest, if the pretended testator's interest had been but a term for years. It was suggested to be the latter; but no such fact appears to have been averred in the indictment; and it was not in proof at the trial. The judges, on conference, held the conviction wrong; for as it was not shown to be a chattel interest, it should be presumed to be freehold. In Moffat's case, (2 East's P. C. 954, 2 Leach, 483, S. C.,) the conviction was for uttering as true a forged acceptance on a bill of exchange void by the statute 17 Geo. 3, ch. 30, s. 1, and all the judges held the conviction wrong; for if it had been a genuine instrument, it would have been

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absolutely void; and nothing could have made it good. In the late case of *Rex v. Burke*, (Russ. & Ry. Cr. Cas. 496,) the defendant was convicted of putting away the following instrument; "I promise to take this at thirty shillings, on demand, in part for a two pound note value received. For Cunliffe, Brooks & Co., R. Cunliffe;" with intent to defraud the firm of Cunliffe, Brooks & Co. The indictment was drawn as at common law; and called the instrument a *promissory note*. The defendant was convicted at the Lancashire summer assizes, in 1822, after which it was mentioned to the judge of assize that this was not a *promissory note*, as it was called in the indictment; and he reserved that point. "It also struck the learned judge, that there was great doubt whether the genuine instrument or writing supposed to be forged or uttered, had any legal validity; and whether it was not a mere nullity, for the forgery of which no indictment could be sustained; and the lord chief justice concurred in that doubt." On the case being submitted to the judges, they decided that the judgment should be arrested. The report does not mention on which of the two grounds suggested at the assizes, the decision of the judges proceeded. It is, however, manifest from the case, that it could not have been the ground mentioned by counsel. Though the indictment might have miscalled the instrument, yet it was set out *verbatim*. Clearly the words *promissory note* might have been rejected as surplusage; and could not have been the foundation either of a motion in arrest, or an objection for variance. I cannot but regard this case as having directly decided the point raised by the judge of assize. The writing was obviously in nature of a receipt or acquittance of thirty shillings on a two pound note; and if the indictment had averred the existence of a note to which it would apply, as in *Roy v. Ferrers*, it would have made out the case. The *People v. Fitch*, (1 Wend. 198,) also holds that the forgery of a paper which, if genuine would be a legal non-entity, does not form the subject of an indictment. In *The Commonwealth v. Linton*, (2 Virginia Cas. 476,) the defendant was convicted on an indictment for forging a bail bond. A

motion was made in arrest of judgment, on the ground that the bail bond was not binding on its face. The court did not question that the objection would have been available if it had been founded in fact; but they applied themselves to show that the bond was good; and on this ground denied the motion. The case of Ames and others, (2 Greenleaf's Maine Rep. 365,) is founded on Savage's case, which I before cited from Styles. In Ames' case, the defendant was convicted of forging a written recommendation purporting to be signed by the selectmen of Sangerville, stating that J. L. was a responsible man, able to satisfy a demand of \$500; that he had bought Ames' land &c.; and that they (the selectmen) should not be afraid to be L.'s bondsmen for 2 or 300 dollars. On motion in arrest the court held that such an instrument, if genuine, would have bound the selectmen as a letter of credit, to the amount of 500 dollars; or would have subjected them to an action for deceit as a false and fraudulent representation. The court say it would, in either mode, "operate as the *foundation of liability*; and they make this the test of the forgery.

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In the principal case, I have shown that the paper forged, if genuine, would be a mere nullity for any purpose; nor, to my mind, could it be made good by any possible averment. It could not be made the *foundation of liability*, like the letter of credit. It does not come within any of the cases sustaining indictments; but to me it appears to be directly within the cases cited holding that an instrument purporting to be void on its face, and not shown to be operative by averment, if genuine, is not the subject of forgery. How is it possible in the nature of things, that it should be otherwise? "Void things are as no things." Was it ever heard of, that the forgery of a *nudum pactum*, a thing which could not be declared on or enforced in any way, is yet indictable? It is the forgery of a shadow.

I grant that on coupling a genuine note, like the one in question, with a consideration, a cause of action would be made. But you must aver the consideration in your declaration, and show it in proof on the trial. It is the subject of

a direct issue. In that sense, here may be the forgery of a piece of evidence, which might be eked out by other evidence, the whole forming a mischievous compound. That answer would hold equally in every case cited; the void will, the void bill of exchange, the void receipt. We are not to be put on an exploring expedition for possible evils. They must be palpable and tangible; a practicable fraud must be shown in the indictment, so that the finger may be put upon it. That a false writing, purporting to be nothing of itself, may be put to some fancied use as an ingredient in the work of mischief, cannot be the criterion of forgery. As Baron Eyre said, in *Jones & Palmer's case*, (1 Leach, 405,) the instrument, to be the subject of forgery, must "purport, on the face of it, to be good and valid for the purpose for which it was created." This, says Mr. East, (P. C. 853, note (a)) "must be understood in respect to the frame or terms of the instrument or writing itself."

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I agree that a man, ignorant of the technical requisites of a special agreement, might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live; and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted, involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory. But legal forgery cannot be made out by imputing a possible or even actual ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime, upon criminal breaches of perfect legal obligation. Had this paper been used as a token, and thus made the medium of actual fraud by the defendant, he would be punishable as for a cheat. The instrument might, in that relative sense, become the subject of an indictment. It here stands alone, and we do not think that legal forgery can be predicated of such a writing, for the reason fully established by authority and principle, that it

is not, on the face of the indictment, of any apparent legal effect

Judgment arrested.

ALBANY,
Oct. 1829.

Remarks of
Mr. Van Rensselaer.

Remarks of J. S. VAN RENSSELAER, Esq., at a meeting of the Albany bar, held at the capitol, in consequence of the death of JOHN V. HENRY, Esq., counsellor-at-law, who died during the October term of the supreme court, 1829.

[In the short progress of these reports, a period of less than seven years, the bar of this state have been called to mourn the loss of three of their proudest ornaments: Mr. John Wells, Thomas A. Emmet, and John V. Henry. I was enabled to sketch the life and character of the first, in a note to my second volume. A good account of the life and character of that gentleman was also afterwards given by Mr. Johnson, my immediate predecessor, at the close of 7 John. *Ch. Reports. Mr. Emmet's eventful life has been left to the more serious labors of the regular biographer. Mr. Henry's life and character were more strictly professional than either of the others. In his knowledge of the law, he was certainly not surpassed by either, though he was behind them in the splendor of forensic display. The high estimation in which he was held by his brethren of the bar, will justify a notice of his life in a place somewhat more durable than that occupied by the usual obituary articles of the day.]

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MR. VAN RENSSELAER opened his remarks by observing, that; participating most sincerely in the general grief produced by the untimely and lamented death of Mr. Henry, he might be permitted, without presumption, to add his tribute of respect to the memory of the deceased. That the bar had convened to express their regret for the death of no ordinary man, but to deplore with a whole community, the sudden and unexpected departure of excellence of a high order, whose loss would be felt as a public as well

ALBANY,
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as private calamity. That Mr. V. R. had well known Mr. Henry; he might say intimately. Mr. H. had taught him the rudiments of the law, and, with several who were present, Mr. V. R. had for three years pursued the study of it under his superintendence, and under his roof. Mr. V. R. took a melancholy pleasure in declaring, that whatever of standing they had attained at the bar, might be chiefly ascribed to the uniform example he had set them of untiring industry, close and accurate investigation, and the most unbending integrity. That notwithstanding Mr. H.'s high reputation as a counsellor and advocate, his devotion to even the drudgery of the profession was proverbial; and until within a few years, during which he had withdrawn himself from the more active pursuits of the law, no man had accomplished more of hard labor in the practice than he had. No cause in his hands ever suffered through want of attention, and no man surpassed him in the zeal and assiduity with which he advocated the interests of his client, to the very end of a cause.

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For some time, Mr Henry had filled the highly responsible office of state comptroller with his usual ability; but mediocrity of fortune and a rapidly increasing family, had induced him at an early period of his life, to abandon political life altogether, and to devote exclusively the energies of his mind to his professional pursuits. His success corresponded with the ardor of his pursuit, and for a long period his professional career was marked with a reputation and success rarely equalled, and perhaps never surpassed. Nature had gifted him with a robust and muscular frame, and a mind at once clear, comprehensive, and energetic, which he had carefully cultivated from early life, and stored with an exhaustless fund of professional and general knowledge; he had drunk deep of the Pierian spring, and as a scientific and well read lawyer, he had ranked with the first who had ever appeared at the bar of this or any other state. He was the cotemporary and competitor of the deeply lamented John Wells and Thomas Addis Emmet; and it was no disparagement to the memory of these great men to say, that he yielded to neither in the

profundity of his knowledge, the intellect, and the persuasion of his

In his intercourse with the world in all respects the finished gentleman, the greatest excitement, for, like all moments, he never failed to sustain his disposition he was frank, friendly to his friends a most engaging and to his family, he was most exemplary affectionate parent could be. The unexpected death of such a man to the community, and should be deplored it would be a matter of surprise and hence and apathy at such an event blot the moral sense and feeling of his bereaved family, his death was apparent enjoyment of full health in many years of domestic happiness in an interesting and growing family, he had been torn from their embraces, and transferred to a brighter and a happier world.

But yesterday, in that very session of all his bodily and mental powers, he competed with the ablest, in the glorious display of his superior superiority; he was now a cloud of glory to become the tenant of the clouds. What a commentary on the value of human objects! What a lesson to the frail tenure of earthly existence, and the vanity of all earthly hopes and earthly pleasures.

That most sincerely did the mourning relatives of the deceased admit of little consolation—time would not permit of a resigned submission to the inscrutable will of an overruling Providence, could they have known the anxiety; their parent and friend had been at the zenith of his usefulness, and he had left his talents, leaving to them, as a

ALBANY,
Oct. 1899.

Remarks of
Mr. Van Rensselaer.

without a stain, and a character of superior knowledge as a lawyer, and exalted worth as a man.

To cherish and revere the memory of his virtues, would now become their melancholy yet pleasing duty. To follow in his footsteps and pursue the career of honorable ambition he had traced out by his example, would be the study of his professional brethren, as the richest tribute they could offer to the memory of the honored dead.

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it. The father conveyed his interest to W, who promised H to pay him the price before agreed on, and P then conveyed by deed under hand and seal, acknowledging the payment of \$10, as the consideration, to W, who then refused to pay the price agreed on to H. Held, that H might maintain assumpsit for the price agreed on. *Whitbeck v. Whitbeck.* 266

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5. The parties in a justice's court agreed, on the suggestion of the justice, to waive their pleadings, and go into their cause on the merits. On judgment being given, one of the parties appealed; and the justice returned the agreement. Held, that no objection could have been taken to the form of the pleadings before the justice, and that the agreement extended also to the cause in the C. P. on appeal; and that no objection to the form of the pleadings could be taken there. *Stephens v. Baird.* 274

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8. The assignment of a judgment for a debt carries the debt; and if the latter be secured by mortgage, it carries the mortgage interest. *Pattison v. Hull.* 747
9. So, if the assignment be of only part of the judgment, and consequently a part of the mortgage debt, an interest in the mortgage passes, corresponding to the proportion of the debt assigned. *id*
10. The legal effect of a written instrument though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained or controlled by parol or extrinsic evidence, than if such effect had been expressed. *id*
11. Thus, where a debt, secured by mortgage, is assigned by writing under seal, without mention of the mortgage, by which a mortgage interest passes as an incident to the debt, it cannot be shown, by parol, that the assignor intended to reserve the mortgage. *id*
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See ASSIGNOR AND ASSIGNEE

ASSUMPSIT.

See MONEY HAD AND RECEIVED. PLEAS AND PLEADING, 11 to 13.

1. In assumpsit by an attorney against his client, for fees, the attorney need not show that a copy of the bill of costs was served on the client before action brought. *Gleason v. Clark.* 57
2. Nor on producing a taxed bill, need he show that notice of taxation had been served on the client. *id*
3. In an action for fees by an attorney against his client, the latter may show, under the general issue, that the attorney conducted the business so negligently that his services were of no benefit to the client; and thus defeat the whole claim. But if the evidence be merely in mitigation or diminution of the value of the attorney's services, then notice should be given with the general issue. *id*
4. Proof, in such an action, that judgment as in case of nonsuit was obtained against the client, is not *per se*, evidence of negligence. *id*
5. An attorney is not bound to proceed in a cause unless his legal fees are tendered, or secured to him, if he requests that this should be done. *id*
5. A set-off existing against a bank when it stops payment, is allowable, whether the debt of the bank be then payable, or to become due afterwards. 409
6. Bills of an insolvent bank are allowable in set-off against the bank, whether in the debtor's own hands, or in the hands of another for his use. *id*
7. An endorser to the bank has the same right to set-off bills as other debtors; but not if he be indemnified, or the maker be able to pay. *id*
8. The evidence upon which the receiver is to act in allowing set-offs, should be such as would maintain a set-off in a court of justice. *id*
9. If he receive the affidavit of the debtor, it should state when, where, and from whom, and under what circumstances he received the bills. *id*
10. If the debtors and sureties be insolvent, the bills of the bank may be received, whatever time they may be obtained by the debtors of sureties; but they should be estimated as much below their par value, as the debt due is probably below its par value. *id*

B.

BAILMENT.

See TRESPASS, 2. 3.

•BALLOTING BOOK.

See MILITARY BOUNTY LANDS, 1.

BANKS.

1. A bank is bound by law to take its own bills or notes in payment of debts. *Per Woodworth, J.*, delivering the opinion of the court. *Niagara Bank v. Roosevelt.* 409
 2. A depositor in an insolvent bank proceeded against under the statute, sess. 48, ch. 325, s. 17, must come in for his deposit as an ordinary creditor, having no preference to others. *Bruyn v. The Receiver of the Mid. Dist. Bank*, note (a) to the opinion of *Woodworth, J.* *id*
 3. So must a cashier of the insolvent bank, for his salary.
 4. Neither a depositor nor cashier have any lien on the funds of an insolvent bank; the
 11. Bills obtained by the solvent debtors of a bank, after it has stopped payment, though before a receiver be appointed, are not admissible as a set-off against the bank. *id*
 12. An over-drawing is a debt due to a bank. *id*
- See AFFIDAVIT, EVIDENCE, 37. PLEAS AND PLEADING, 15 to 18. PROMISSORY NOTE, 3.

BARGAIN AND SALE.

See DEED, 7, 8, 9.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PROMISSORY NOTE.

BILL OF PARTICULARS.

See ABATEMENT, 2. INDICTMENT, 1

BOND OF DEPUTY SHERIFF.

See PRINCIPAL AND SURETY.

C.
CASHIER OF A BANK.

See PROMISSORY NOTE, 3.

CERTIORARI.

A nonsuit before a justice, after hearing proofs, cannot be reviewed by certiorari; but only by appeal. *Gleason v. Clarke*. 57

See JUSTICES' COURT, 9.

CHARGE OF JUDGE.

See ERROR, 4, 6. EVIDENCE, 9 to 12, 40, 41, 42, 45, 46. PARTITION, 11. PRACTICE. TENANT IN COMMON, 4.

CHARITIES.

Jurisdiction of the court of chancery in the case of charities, considered and vindicated. Per JONES, chancellor, *arguendo* in support of his decree. *McCartee v. Orph. Ass.* So. 437

CHATTEL.

See FRAUDS, STATUTE OF, 1.

CHEATS.

At common law, an indictable cheat was such only as affected the public; such as common prudence could not guard against. The law was altered and extended, by statute, to all cheats by false pretences. In all cases, an indictment for a cheat must set out, particularly, the false token or pretence. Per SPENCER, Senator, conceded per STEBBINS, Senator. *Lambert v. People*. 578

CHOSE IN ACTION.

See ASSIGNOR AND ASSIGNEE, 1, 2, 8 to 12, TROVER, 5.

COMMISSION TO TAKE TESTIMONY.

See EVIDENCE, 16.

COMMON BARBARATRY.

See INDICTMENT, 1.

COMMON NUISANCES.

See INDICTMENT, 1.

COMMON SCOLDS.

See INDICTMENT, 1.

COMPARISON OF HANDWRITING.

See EVIDENCE, 15.

COMPENSATION.

See JUDGMENTS AND EXECUTIONS, 15, 16, 17

CONDITION.

See DEED, 10, 11, 12. ERROR, 3.

CONFESSION.

See EVIDENCE, 5, 6, 8.

CONSIDERATION.

See AGREEMENT, 2, 4. DEED, 3, 7, 8, 9. FRAUD. PROMISE.

CONSTABLE.

See JUDGMENTS AND EXECUTIONS, 11, 12.

CONTRACT.

See AGREEMENT. FRAUDS, STATUTE OF, 2, 3. PROMISE. PROMISE OF INDEMNITY.

CONSPIRACY.

1. An indictment for a *conspiracy* was, that the defendants, intending unlawfully, by indirect means, to cheat and defraud a certain incorporated company (naming it) and divers others unknown, of their effects, did fraudulently and unlawfully conspire together, injuriously and unjustly, by wrongful and indirect means, to cheat and defraud the company and unknown persons, of their effects; and that in execution thereof, they did, by certain undue, indirect, and unlawful means, unlawfully cheat and defraud the company and unknown persons, of divers effects. The court for the trial of impeachments and the correction of errors being equally divided on the question, whether this was a valid indictment, it was decided, by the casting vote of the president, that it was defective; and the judgment of the supreme court sustaining it was reversed. *Lambert v. People*. 578

2. Where an indictment for a conspiracy does not set forth the object specifically and show that such object is a legal crime, it should particularly set forth the *means* intended to be used by the conspirators; and show that those means are criminal. Otherwise, it charges no crime which the law can notice. id

3. Where such a fraud as may be punished criminally is actually committed by several persons, in pursuance of a conspiracy between them, for that purpose, the conspiracy, as such, is not indictable, but the fraud only. Per SPENCER, Senator. 578

4. Whether an indictment lies for a conspiracy to produce a mere private injury which is not a legal crime, and would not affect the public, nor obstruct public justice? *Quere.* Per SPENCER, Senator. *id*

5. An indictment charging generally, that the defendants conspired to defraud an individual, and not showing the intended means by which the fraud was to be compassed, is bad. *id*

6. Provisions in the new revised laws (pt. 4, ch. 1, tit. 6, § 8, 9, 10,) on the subject of conspiracy, with the reasons in their favor as rendered by the revisors. By these provisions, conspiracies to commit any offence; falsely to charge another with, or arrest, or indict him for an offence; falsely to move or maintain a suit; to defraud another of property by criminal means, or by means which, if executed, would amount to a cheat, or obtaining goods, &c. by false pretences; or to commit any act injurious to the public health or morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws, are misdemeanors; and such only are indictable. And no agreement, except to commit felony on the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act be done beside the agreement by one or more of the conspirators. Note (b) at the end of the case. *id*

7. English and American cases and authorities cited, stated and commented upon in reference to the following questions: Whether a conspiracy to commit a private fraud or a fraud upon a private individual, or any other wrong not punishable as a crime, be indictable, and in what cases; whether a conspiracy to commit a fraud on an insurance corporation, or other corporation for the public benefit, be indictable, the means in each case not being other than the mere act of conspiring; whether charging by indictment, simply a conspiracy to cheat, without saying what kind of cheat, imports a cheat punishable criminally; whether, in charging a conspiracy to commit either a civil or criminal fraud, it be necessary to set out the means beyond the act of conspiring; and whether a conspiracy to commit a crime shall be said to be merged or absorbed, by being carried into effect. Per STEVENS, Senator. *id*

CONSTITUTIONAL LAW.

See JUSTICE OF THE PEACE. M
BOUNTY LANDS, 9.

CONTRIBUTION.

1. Where a judgment is against two debtors, and the surety of one of them limit bond is compelled to pay the debt, the ground of an escape of the one equivalent to a direct payment principal; and the co-debtor is liable to contribute to him (the principal) equally. At any rate, the principal refunding the money to his surety, is entitled to contribution from his co-debtor. *Ransom v. Keyes.*

2. Where one of two joint debtors can debt to be paid by a surety on given by the surety, this is equivalent to a direct payment by the debtor; and sue his co-debtor for money paid. At any rate, he may do this after refunded to his surety.

3. A discharge of one of two joint debtors under the insolvent act, before paying his co-debtor, will not affect the contribution of the co-debtor for contribution against the discharged debtor, towards the payment of the debt by the other, made subject to the insolvent assignment.

See EVIDENCE, 21, 22.

CONVERSION.

See TENANT IN COMMON, 4.

CORPORATION.

1. An act of incorporation authorising a company to take by purchase, means to the restrictions and incapacities by other general statutes. *McCauley v. Orph. As. So.*

2. The right to purchase is incident to incorporation.

See EVIDENCE, 37. PLEAS AND PLEADINGS, 15 to 18. WILL, 6 to 18.

COSTS.

1. In debt for \$250, the penalty of an agreement, the defendants demurred to the declaration; and had judgment against them; with leave to withdraw the declaration, and plead on payment of costs. That these should be supreme court costs, on a judgment against the defendants, the nominal damages might be

which would carry the sum over \$250.
Hulin v. Rockwell. 652

2. It seems that final judgment on a plea to a declaration on a writing obligatory should not be for damages as such; but simply for debt and costs. Note (a). *id*

3. In trespass for cutting, under the act, (1 R. L. 525,) for a wilful trespass, where the whole recovery is less than \$50, in favor of the plaintiff, he must pay costs to the defendant. *Hasbrouck v. Schoonmaker.* 692

See ATTORNEY, COSTS IN CHANCERY. PARTNERS AND PARTNERSHIP, 5.

COSTS IN CHANCERY.

1. Costs in the court of chancery are given to or withheld from the successful party in the discretion of the court. *Pattison v. Hull.* 747

2. The course of the court is uniform, where the question raised is a fair one, and difficult for the parties to settle themselves, not to give costs against the unsuccessful party. *id*

COURT OF CHANCERY.

See AGREEMENT, 8, 4. APPEAL FROM THE COURT OF CHANCERY TO THE COURT OF ERRORS, CHARITIES, COSTS IN CHANCERY. DEBTOR AND CREDITOR, 2 to 5. DEED, 37. ENTRY. EVIDENCE, 48. FRAUD. JUDGMENTS AND EXECUTIONS, 14 to 17. PARTIES, 2, 3, 4, 5. PARTITION, 3, 4, 10. PLEADINGS IN CHANCERY. USES AND TRUSTS, 3, 5.

COURT OF ERRORS.

See AMENDMENT. APPEAL FROM THE COURT OF CHANCERY TO THE COURT OF ERRORS. RULES.

COURT MARTIAL.

See PLEAS AND PLEADING, 35.

COURTS OF JUSTICES OF THE PEACE.

See JUSTICE'S COURT.

COURT OF OYER AND TERMINER.

1. Whether, in this state, a court of oyer and terminer having sentenced a malefactor, upon conviction before them, to capital punishment, have power, after they have adjourned, on being afterwards, upon fur-

ther examination, convinced of his innocence, to suspend his execution or grant a reprieve, till the case can be laid before the pardoning power? *Quere. Miller's Case.* 730

2. By the common law, the judges may relieve, even after adjournment; and the only question is, whether this power be wanting here either from the frame and principle of our government, or is impliedly denied or withheld by the constitution. But *vid. 2 R. S. 658.* *id*

3. This question examined upon the constitution, upon principle and authority, in a correspondence between Clinton, governor, and Edwards, circuit judge, president of the oyer and terminer of the city of New-York, in a case (stated,) wherein that court had reprieved the capital execution of a prisoner after sentence. *id*

COVENANT.

See ASSIGNOR AND ASSIGNEE, 7. DEED, 1, 30, 31, 32, 33. MONEY HAD AND RECEIVED, 1, 2, 3. PLEAS AND PLEADING, 32, 33, 34

CROP.

See DEED, 5. EVIDENCE, 3, 4, 5, 6. TRESPASS, 1.

CROSS BILL.

See PRACTICE OF CHANCERY, 3.

D.

DAMAGES.

See JUDGMENTS AND EXECUTIONS, 15, 16, 17.

DEBT.

See PLEAS AND PLEADING, 6 to 9.

DEBTOR AND CREDITOR.

1. No act of the creditor can affect the relation between several debtors, in respect to their rights and liabilities as between themselves. *Catakill Bank v. Messenger.* 37

2. A creditor having obtained judgment, and procured his *f. fs.* to be returned unsatisfied, may file his bill against a debtor of the defendant to whom he has loaned moneys or sold goods on credit for the purpose of keeping the fund out of the reach of his (the defendant's) creditors; and chancery

will divert the payment from the defendant to his creditor so filing his bill. *Weed v. Pierce.* 722

3. If the creditors to whom the defendant loaned or sold are privy to the fraud, they may be compelled to pay immediately, though their debt was contracted on a credit: but if not privy to the fraud, they may be compelled to pay the debt to the execution creditor at the expiration of the credit. *id*

4. Where there are several judgment creditors of the defendant, holding different judgments, they need not be made parties. *id*

5. The issuing and return of a *f. fa.* does not give a lien on the fund: but the filing of the bill, or doing some other decisive act showing an intention to pursue the fund. *id*

See ASSIGNOR AND ASSIGNEE. CONTRIBUTION. FRAUDS, STATUTE OF, 2, 3. FRAUDULENT SALES AND CONVEYANCES. INSOLVENT LAW. JUDGMENTS AND EXECUTIONS, 1, 8, 9, 10, 11, 12, 13, 14, TO 17. MORTGAGE, 13. PAYMENT.

DECLARATION.

See PLEAS AND PLEADINGS, 1 to 13, 19 to 24, 26, 32, 33, 34. SLANDER, 1.

DECREE.

SEE ENTRY.

DEED.

1. A quit claim deed, or deed without warranty, by one having no title at the time, will not operate to carry a title subsequently acquired by the grantor. Otherwise of a deed with warranty. *Jackson v. Winslow.* 13

2. A judgment debtor holding a deed of lands is seized as to his creditor, though his deed be not recorded pursuant to the statute. Hence, a conveyance or mortgage *bona fide*, by him, intermediate the judgment and a sale on a *f. fa.* will not defeat the latter sale; for this relates to the time of docketing the judgment. *id*

3. A grantee, assuming the payment of a debt due from his grantor, is a sufficient consideration to make a purchase or mortgage of land valid within the registry acts, as against an unrecorded deed. *id*

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5. The form of a certificate of the proof to be endorsed on a deed, in order to make it evidence, and entitle it to be recorded, under the act of 1788. (Sess. 11, ch. 44. 2 Greenleaf, 99.) It need not state that the officer knew the witness, or that the witness knew the grantor. *id*
6. A deed of military land having been duly acknowledged and recorded in April, 1795, (not according to the act of 1813,) so as to make it evidence according to the existing laws in 1795, may be read in evidence now, though not acknowledged or recorded pursuant to the act of 1820, (sess. 43, ch. 245, § 3,) and though that act literally prohibits all deeds dated before 1797 from being evidence, unless acknowledged or proved according to the statute of 1813, (sess. 36, ch. 97, § 1.) *id*
17. Form of a certificate of acknowledgment to be endorsed on a deed under the statute of 1788, in order to make it evidence, and entitle it to be read, where the grantor is unknown to the officer taking the acknowledgment. The name of the witness proving the identity of the grantor need not be giving in the certificate. Conceded by the counsel who first objected the want of such name. *id*
18. Note, the act does not, in terms, require any proof of identity. *id*
19. Form of a certificate of acknowledgment to be endorsed on a deed, in order to make it evidence, under the act of 1813, (sess. 36, ch. 97, § 1.) taken before a first judge of the degree of counsel in the supreme court. *id*
20. The certificate of acknowledgment taken before a county judge of the degree of counsel, &c. proves, *per se*, the deed out of his county, and entitles it to be recorded there, without the certificate being authenticated by the clerk of the county in which the judge resides. *id*
21. Form of a certificate of acknowledgment to be endorsed on a deed, in order to make it evidence under the act of 1813. *id*
22. It is not necessary in such certificate, that the deed should be proved by the original subscribing witness. And where there was only one subscribing witness, and he did not prove the deed, but the party to the deed acknowledged the execution before another witness at a subsequent period, who then subscribed his name as a witness; held, that he might prove these circumstances before the judge, this being equivalent to an original execution in the presence of the witness. These matters appearing in the certificate, held sufficient and that the deed might be read. 94
23. *Semble*, that adverse possession of land by an alleged grantee, in a deed, and those claiming under him, though not continued 20 years, is entitled to some weight in showing the genuineness of the deed against proof to impeach it. *id*
24. Otherwise, it seems, where the question is simply one of adverse possession, set up to bar an entry under the statute of limitations; and there it seems, where there is a succession of tenants, the chain must be unbroken for 20 years. *id*
25. As between the parties to a deed, though in a recording county, the recording of it is not necessary to give it force and effect. Title passes without registry. *Jackson v. Post.* 120
26. But an unrecorded deed in a registering county, within the act, (1 R. L. 370, sess. 36, ch. 97, s. 4.) which declares it void, as to subsequent *bona fide* purchasers or mortgagees, &c. is not void as against a judgment. And therefore, where the debtor in the judgment conveyed his land before judgment obtained, though the deed was not recorded for several years after a sale under the judgment, and no notice of the first deed was given to a subsequent grantee under the judgment, yet held that the judgment was no lien on the land, and that the conveyance by the judgment debtor was valid even as against a subsequent *bona fide* purchaser under the judgment. *id*
27. Though a deed conveying land or other real estate not lying in grant, be altered, even feloniously, after its execution, this does not avoid the title to the subject conveyed. *Jackson v. Jacobs.* 125
28. Though a deed containing operative words both of a *partition* and an *original* deed, may be good as a partition deed merely, the interests of the parties appearing, in fact, or on the face of the deed, to be a common interest, and the deed being confined to that; yet, if this be not so, it will pass the interest of the several grantors, as an original deed, provided they have any such interest as may be covered by the words describing the subject matter. *Jackson v. Tibbits.* 241
29. A deed must receive its construction, as to what it shall convey, from its language and subject matter. *id*
30. A grantor, having no title, conveys with covenants of seisin, quiet enjoyment and warranty. He afterwards acquires title

This, in general, enures to the benefit of the grantee by way of estoppel against the grantor, who cannot recover the land from the grantee in virtue of the subsequently acquired title. *Jackson v. Hoffman.* 271

31. But where a grantor recites in his deed that the grant is subject to a certain claim, (e. g. a mortgage) and then covenants that he is seised, that the grantee shall quietly enjoy, and that the grantor will warrant against all claims, the recital qualifies the covenants; and prevents their application of such claim. *id*

32. Where there is any thing for a warranty to operate upon, the doctrine of estoppel does not apply. *id*

33. Nor does it apply except as between the same parties acting in the same character. *id*

34. Artificial monuments or boundaries shall control distances in the description of parcels in a deed. *Jackson v. Ives.* 661

35. All negotiations between the parties prior to, or contemporaneous with the execution of a deed, are merged in it. *Pattison v. Hull.* 747

36. A deed of a thing passes the incident as well as the principal, though the latter only be mentioned; and this effect cannot be avoided without a reservation in the deed, or at least by an instrument contemporaneous with, and therefore making a part of the deed. And this rule is the same at law as in equity. *id*

37. The correction of a deed on account of mistake, ignorance or accident, cannot be made collaterally; but only on bill filed presenting the very point, so that an issue and proof may be taken upon it. Then, if the ground of relief be made out, the court reforms the deed. *id*

See EVIDENCE, 3, 4, 5, 6, 14, 18, 19, 23, 24, 26, 27, 29, 31, 32, 34, 35, 47. JUDGMENTS AND EXECUTIONS, 2, 3, 6, 13. PLEAS AND PLEADING, 21, 23, 29, 30, 31.

DEFORCEMENT.

See ADVERSE POSSESSION, 5, 6, 7.

DEPOSITARY.

See ORDER FOR GOODS.

DEPUTY SHERIFF.

• See JUDGMENTS AND EXECUTIONS, 7. SCIRE FACIAS.

DESCENT.

See EVIDENCE, 36. MILITARY BOUND, 4, 5, 6, 7, 8, 9, 10.

DEVASTAVIT.

See EXECUTORS AND ADMINISTRATORS.

DEVISE.

See WILL.

DISSEISIN.

See ADVERSE POSSESSION, 3, 4, 16. TION, 5, 6, 7, 8.

DISTRESS.

See ENTRY.

DOMESTIC ANIMALS.

See TRESPASS, 2, 3.

E.

EJECTMENT.

1. Merely moving hay-scales or ground of another, and never interfering with them, does not constitute a possession in the party removing to subject him to an action of ejectment. *Jackson v. Pike.*

2. An outstanding title in a person other than the lessor of the plaintiff is sufficient to defeat his recovery if the defendant do not claim under him. *Jackson v. Harrington.*

3. And this, it seems, though the title be in the trustee of the lessee.

4. When a re-conveyance from a trustee is presumed.

5. A judgment for the plaintiff in ejectment generally terminates all presumption in favor of the defendant's title, arising from prior possession. *Jackson v. Tuttle.*

6. A defendant in ejectment can no longer transfer his possession so as to defeat execution in the ejectment; but a sale of his right on judgment would a sale of his right on judgment protect the purchaser in his possession.

7. But otherwise, where a judgment in ejectment is obtained by *cognovit*, after

ment at the suit of a creditor is docketed against the defendant in ejectment, under which his right is sold. In such case, the purchaser may hold or recover possession against the plaintiff in the ejectment, on the defendant's prior possession; and this, even though the *cognovit* be given in pursuance of the award of arbitrators. 86

2. Though one has recovered in an ejectment yet the recovery is not conclusive upon the defendant or those claiming under him. And accordingly, where, after a recovery in ejectment, the defendant's title was sold on judgment and execution and the purchaser brought ejectment against the former recoveror in possession, who set up a mortgage against the former defendant, which proved to be usurious and therefore void, *held*, that the purchaser should recover. *id*

9. One setting up and claiming under a mortgage, admits the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious, shows that such title was not affected by it. *id*

10. In ejectment, the execution for costs against the defendant, properly issues in the name of the nominal plaintiff alone. *Brown v. Demont.* 263

11. The plaintiff in ejectment must, at the trial, prove the defendant in possession of the premises in question, or he cannot recover. *Jackson v. Ives.* 661

See JUDGMENTS AND EXECUTIONS, 4, 5, 6, PARTITION, 9.

ELECTION.

See WAGERS.

EMBLEMENTS.

See DEED, 5. EVIDENCE, 4, 5. TRESPASS, 1.

ENDORSEMENT.

See ORDER FOR GOODS, 6.

ENTRY.

1. One purchases land upon a decree of the court of chancery. He may enter peaceably and take possession without writ, and being so in possession, may distrain cattle *damage feasant*. *Orser v. Storms.* 687

2. Though *semb.* if he enter forcibly, he would be subject to an indictment. *id*

See PARTITION, 6, 7, 8.

EQUITABLE TITLE.

See AGREEMENT, 3, 4.

EQUITY.

See AGREEMENT, 3, 4. DEBTOR AND CREDITOR, 2 to 5. DEED, 37. FRAUD. JUDGMENTS AND EXECUTIONS, 14 to 17. PARTITION, 3, 4, 10.

ERROR.

1. A writ of error, returnable in the court of errors, should be made returnable at a general session of that court. *Clapp v. Bromaghann.* 304

2. Judgment in partition is against A. and owners unknown. Either of the defendants may bring error without joining any other, but the record must be described correctly in the writ as to parties. *id*

3. A party who does not object to want of proof of the performance of a condition precedent on the trial, cannot raise the objection on error. Per DAYAN, senator. *Dale v. Roosevelt.* 307

4. A verdict cannot be reversed, on error, as being against the weight of evidence; but it will be reversed for a wrong direction of the court to the jury, on a question of law or the legal result of the evidence. *Clapp v. Bromaghann.* 530

5. P. recovered in the C. P. against G., who brought error to the S. C., who reserved the judgment of the C. P., and ordered a *venire de novo* in the C. P. In the mean time, P. had collected his judgment below. G. then took a writ of restitution, and an execution for his costs in the S. C., and the money collected in the C. P. was restored, and the costs in the S. C. collected. G. then compelled P. by rule in the C. P. to go to trial on the *venire de novo*, who went on accordingly, and obtained a second verdict and judgment against G., and then brought a writ of error from the judgment of the S. C. *Held*, that he had a right to his writ of error from the S. C., that his proceedings in the C. P., were no waiver of his right to bring error: and per JONES, Chancellor, a reversal of the judgment in the S. C. will be reversal of all the consequent proceedings, including those in the C. P. upon the *venire de novo*. *Pinney v. Gleason.* 635

6. A charge or opinion of a court which is entirely abstract, or out of the case, so as not to affect it, though erroneous, cannot be insisted on as erroneous by exception.

But the court of error will look through the case; and if they find that it might have been affected by the charge or opinion, injuriously to the plaintiff in error, the judgment will be reversed. *Clark v. Dutcher.* 674

See AMENDMENT. EVIDENCE, 9 to 12. JUSTICE'S COURT, 9.

ESCAPE.

1. Under a single count for an escape, and plea of voluntary return, the plaintiff may, without a new assignment, prove a single escape on any day before suit brought, electing which and the defendant may then show a return into custody, &c. before suit, and apply his plea to such return. *Howland v. Squier.* 91
2. But though the plaintiff has not newly assigned, the defendant cannot show a previous escape and return, and defend himself by setting this up as the escape in question. *id*
3. A voluntary return, in escape against the Sheriff, cannot be given in evidence under the general issue. *id*
4. The arrest of a debtor on a *ca. sa.*, and a subsequent discharge from the arrest by consent of the creditor, extinguishes the judgment. *Ransom v. Keyes.* 128
5. So the arrest on a *ca. sa.*, and discharge of one of several joint debtors, by consent of the creditor, discharges and extinguishes the judgment as to all the debtors. *id*
6. Thus, where one of two joint judgment debtors was arrested on a *ca. sa.*, and gave bond for the limits, and escaped, and the sheriff was sued for the escape; and then the other debtor was arrested on an *alias ca. sa.*, and on paying part, was discharged by consent of one of the creditors, pending the escape suit; *held*, that the whole judgment was extinguished; that this formed a valid defence to the action for the escape which the sheriff should have pleaded, (the discharge being in season for his doing this;) and his neglect to defend on this ground was in his own wrong; and, though he had suffered a recovery and paid the money in the action for the escape, he could not collect the amount paid by him upon the limit bond of the defendant who had escaped. *id*
7. Where a sheriff, sued for an escape, waives defence known to him, he acts at his peril; and though the parties to the limit

bond have notice of the suit, they are not liable. 129

ESTOPPEL.

See DEED, 1, 30 to 33. EVIDENCE, 48. JUDGMENTS AND EXECUTIONS, 4, 11.

EVIDENCE.

1. Possession of land is *prima facie* evidence of seisin. *Jackson v. Winslow.* 13
2. Before arbitrators, or on the trial of a cause, one oath to a witness is enough, though he be examined on different matters and at different times: and, though the time for the award (in case of arbitration) be enlarged after he is sworn, yet he may be examined on his first oath after the enlargement. *Bullock v. Koon.* 30
3. Parol evidence is not admissible to contradict, or substantially vary, a written contract. *Austin v. Sawyer.* 39
4. And where A. quit-claimed land to W., on which a crop of wheat was growing, reserving the wheat by parol, both at the time of the quit-claim executed, and in a previous conversation, when it was agreed by the parties that it should be reserved, such reservation was held inadmissible to contradict the conveyance in writing, which carried the title of the wheat with the land. *id*
5. W. sold and assigned his interest in the land to S. which, as S. claimed, carried the title of the wheat, still growing, to him; and he out and carried it away. But before the sale or assignment to him, and (a witness thought) at the time, W. stated that the wheat belonged to A. *Held*, that A. might recover of S. the value of the wheat on the ground; that W's declarations were evidence of a sale to A. subsequent to the quit-claim. And *held*, that A. might maintain trespass *quare clausum fregit.* *id*
6. And *note*, that the declarations of W., a vendor, made before the sale, were received in evidence to affect the rights of his vendee, though the vendor was a competent witness for the plaintiff, which is contrary to, and seems to overrule one point that was held in *Hurd v. West*, (7 Cowen, 752.) *id*
7. Any of the co-debtors not sued are competent witnesses for the plaintiff against the debtor sued. *Gay v. Cary.* 44
8. The confession of a debt by one of several partners, after the dissolution of the part-

nership, is inadmissible evidence as against the other partners. *Gleason v. Clark*.

- 9. Where a court, in charging the jury, recapitulates the testimony of a witness, the counsel for one of the parties insists that the court misunderstood the testimony of the witness in a material particular, and proposes to call him, in order to correct it; it is discretionary with the court whether he shall be called for that purpose. The court erred in the exercise of that discretion, and a writ of error will be granted for that cause. *Merrills v. Law*.

- 10. A witness was called to prove a note, and it was material whether the testimony related expressly to the contents of the note, or left it open for the jury to infer that it might have related to a subsequent transaction. The court in this case stated it in the latter sense. The evidence was misused, and the court erred in refusing to re-examine the witness on that point. This the court *held*, error.

- 11. It is not uncommon for a witness to be re-examined by the jury, and a verdict may arise after they have considered their verdict.

- 12. Where, in an action on a promissory note, the defence was usury, founded on the fact that the interest was more than 7 per cent. of the loan, and the witness, who proved an agreement for more than 7 per cent. with interest, pressed terms, that it was not showing that it was no subsequent agreement being alluded to in the note. *Held*, that the court erred in directing the jury that the agreement was at the time the agreement was at the loan, and the court erred, error lay.

- 13. Bad terms, or conditions, arising between a party and another, against whom he is an endorser of the note, do not go to the jury.

- 14. The recital of the contents of the note, and those of the parties, especially if he is a party, on their part produced, is not a defence. *Jackson v.*

- 5. Proof by juxtaposition to ascertain

the surety in the bond, from liability to contribute to the principal in the bond. 128

If he omit to do so he cannot avail himself of the defect on a motion for a new trial. 140

23. A patent was to Patterson, who was described in the balloting book by that name, and as a revolutionary soldier. The plaintiff proved and relied on a deed from Patterson described as such soldier in the body, but signed Petterson; *held*, no material variance, and that at any rate it was such an ambiguity as might be explained; and that if the soldier intended by the deed was Petterson, and a man different from Patterson, it lay with the defendant to show this. He had a right to show it. Jackson v. Cody. 140
24. To warrant proof of the hand-writing of subscribing witnesses, or either of them, as a substitute for their production; it must be proved that they are all either dead or beyond the jurisdiction of the court. This must be shown with reasonable certainty. *id*
25. Proof that a witness cannot be found on diligent enquiry, is evidence of his death or absence. (Inquiry in this case was made mainly at the place where the deed described the grantor as residing.) *id*
26. Where there was a dispute as to the identity of a witness to a deed, there being several persons of the same name, a witness in order to identify him, was allowed to compare the hand-writing subscribed as an attestation to the deed with another writing long in his possession, and reputed to be the hand-writing of a man of the name subscribed, though he had never seen that man write. This evidence was received without objection; and the court inclined to think the evidence would have been admissible for the purpose of identity, even if it had been objected to. *id*
27. Where all the subscribing witnesses to a deed are dead, proof of the hand-writing of one of them proves the deed. *id*
28. Testimony not objected to must be considered as received by consent. *id*
29. Where the lessor of a plaintiff shows a deed of land under which he claims from A. and the defendant shows a subsequent deed of the same land, under which he claims from a person of the same name with A. it lies with him (the defendant) to show that the grantor in the first deed was not the owner of the subject granted. *id*
30. If there be a defect of proof on one side at the trial which may be supplied, the opposite party must object to such defect.
31. Thus, where the defendant claimed land in the military tract as a subsequent purchaser, the plaintiffs' previous deed having been duly deposited as required by law, on a motion for a new trial, the defendant would have objected that the mere deposit of the deed was not notice to him; and *non allocatur*, for this was not objected at the trial: and *non constat*, that if it had been actual notice, might not have then been proved. *id*
32. And so, *semble*, actual notice of a deed of military land makes it available against a subsequent purchaser, though the first deed was not registered. *id*
33. What is sufficient to prove the death or absence of a witness beyond the jurisdiction of the court, viz. that he went from his residence more than 20 years ago, (as the witness testifying understood,) to New Orleans, or somewhere to the southward, and the witness testifying had since heard he was dead; received without objection. *id*
34. The directory of the city of New York for the year 1792, searched, proved and produced in evidence without objection to identify a grantor in a deed. *id*
35. Endorsement of registry of a deed of military bond lands by the clerk of Albany, proved in a book kept in pursuance of the act of January, 1794. *id*
36. Claims of title and descent proved, showing claim of 5.9 of the premises in question. *id*
37. Upon the general issue, or *ul tuel corporation* pleaded in an action by The Jefferson County Bank, incorporated by the statute, (secs. 39, ch. 231,) it is not sufficient for the bank merely to produce the act of incorporation; but certain steps were required by the statute to be taken before the corporation had existence; e. g. opening books, subscription and distribution of stock, the choice of directors, and by them a president and cashier, &c. Yet producing the books showing the election of the officers, and the affidavit required by the 1st section of that act, are *prima facie*, sufficient to prove that all the previous steps required by the statute were taken. Wood v. The Jefferson Co. Bank. 194
38. To warrant the proof of a lost will, not shown to be destroyed, by parol, it must

be shown that diligent search was made for it at the place where it is most likely to be found, as in the desk where the testator usually kept his most valuable papers. *Jackson v. Betts.* 208

39. Proof of search for, or loss of a paper, to warrant secondary evidence of its contents may be made by the oath of a party in the cause, though he be interested. *id*

40. Where facts are not disputed, the law on those facts is to be declared by the court. But where the law and the fact are so blended that they cannot be separated, the jury pass on both, under the advice of the court. *id*

41. Where facts are conceded or fully established, it is the duty of the judge to state the law arising on the facts to the jury whose duty it is to receive it from the court. If he err, the supreme court will correct the error, but counsel have no right to argue to the jury a question upon facts which the judge pronounces to leave no question open. *id*

42. Proof that a testator, after having made his will, took certain papers out of his desk where he kept all his valuable papers, and burnt the papers taken out, without showing that the will was among them, is not sufficient evidence to go to the jury, upon the question of revocation, even in connection with the fact that the will could not be found at the testator's death. Nor should counsel be allowed to urge these matters to the jury as evidence from which they may infer a revocation. *id*

43. Whether it would be competent evidence in order to repel proof which might admit a presumption that a will had been cancelled, that the testator went to the house of a friend, and requested him to draw a codicil to his will, but which was not done? *Quers.* *id*

44. What shall be taken as part of the *res gesta* of a transaction, and not a mere declaration. Discussed by counsel on principle and authority. *id*

45. When there are facts to be passed upon, and the material evidence from which a conclusion is to be drawn is not clear and explicit, such evidence should be left to the jury. *Hyde v. Stone.* 230

46. It is not competent for a judge to direct a verdict subject to the opinion of the court unless by consent of parties. *id*

7. The rule that a deed shall not be contradicted by parol, applies only as between

parties or privies to it. And it does not apply, even as between them, in respect to the acknowledgment of consideration paid in a deed of land. In such case, even the grantor may show that the consideration was not paid. *Whitbeck v. Whitbeck.* 266

48. All the parties defendants to a bill of foreclosure in the court of chancery are stopped from questioning the title derived from the decree of sale. *Jackson v. Hoffman.* 271

See ASSIGNOR AND ASSIGNEE, 3 to 7, 10, 11, ATTORNEY, 1 to 4. DEED, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 35, 36. EJECTMENT, 4, 5, 8, 9, 10, 11. ESCAPE, 3. FALSE IMPRISONMENT. JUDGMENTS AND EXECUTIONS, 2, 3, 4, 5, 6, 11. JUSTICE'S COURT, 10, 11, 12, 13. LIMITATIONS, STATUTE OF, 2, 3, 4. MILITARY BOUNTY LANDS, 10. NEW TRIAL. ORDER FOR GOODS, 2, 3. PARTITION, 5, 6, 11. PARTNERS AND PARTNERSHIP, 1, 3, 4. PRACTICE OF CHANCERY, 5. PROMISE OF INDEMNITY, 4, 5. SLANDER, 2, 3. TENANT IN COMMON, 4. WAGES, 2. WILL, 4, 5. WITNESS.

EXECUTION.

See JUDGMENTS AND EXECUTIONS. REPLEVINS.

EXECUTORS and ADMINISTRATORS.

1. Executors are esteemed but one person in law; and acts done by one of several, relating to the delivery, sale or release of the testator's goods are the acts of all. *Wheeler v. Wheeler.* 34

2. Thus, one of two executors may assign a note belonging to the estate of their testator. *id*

3. So he may pledge such note or assign it, as collateral security, for a judgment obtained against the estate of his testator. *id*

4. Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a *devastavit*, and is accountable to the person injured by such disposition directly, on a bill filed by him. *Colt v. Lasnier.* 320

5. E. g. Where the executor being one of a trading firm, with the knowledge of the firm, mixed the funds of his testator's estate with those of the firm, and they were thus employed in trade; *held*, that the firm were liable for these funds to a legatee of the testator. *id*

6. And this, even admitting that the funds had been carried to the account of the executor, and the account as to these closed on the partnership books. 820

7. The English and American cases upon this doctrine, stated and commented upon, both as they respect the rights of legatees and creditors. Per SAVAGE, Ch. J. delivering the opinion of the court. *id*

8. The executor, or, if he be dead, his personal representative, should be a party to the investigation; and the cause may stand over after a hearing and opinion given upon the merits till he be made a party. Per BETTS, C. Judge, sitting for the chancellor, and giving reasons. *id*

9. An administrator *de bonis non* is the full representative as to all effects not duly administered; and may seek a discovery and account of them in whosoever hands they may be, so long as they belong to the estate. Per BETTS, C. Judge, sitting for the chancellor, and reasoning in support of his decree. *id*

See PARTIES, 2.

EXTINGUISHMENT.

See ESCAPE, 4, 5, 6.

F.

FALSE IMPRISONMENT.

In false imprisonment, brought by a defendant in ejectment against a lessor of the plaintiff in the ejectment suit, for an arrest on a *ca. sa.*, on the ground of the judgment having been subsequently set aside for irregularity, it is not sufficient to sustain the action, that an arrest was made on a *ca. sa.* in favor of the nominal plaintiff in the ejectment suit against the defendant. There must be some collateral evidence to connect the execution with the judgment, and the lessor with the execution. The coincidence between the sum of the judgment and execution does not sufficiently connect them; and it should be shown that the lessor, or his attorney, issued the execution, or that one of them was in some way privy to it, or had recognized it. *Brown v. Demont.* 263

FEEES.

See ATTORNEY.

FINDING.

See TROVER, 3, 4, 5.

FORCIBLE.

See ENTRY.

FORECLOSURE.

See EVIDENCE, 48. MO
PRACTICE OF CH.

FORGERY.

1. The forgery of a writ contain a mere naked proof of money in labor, expropriation, and being connection by an averment is not an indictable crime. Shall.

2. Forging any instrument it appears on the face would have been void, is indictable crime.

See DEED, 27. E

FRAUD.

1. In an action at law on relation to its consideration *Dale v. Roosevelt.*

2. But relief may be had *VIELE*, senator.

See ADVERSE POSSESSION, AND CREDITOR, 2 to 5. ING, 1 to 5.

FRAUDS, STATUTE.

1. Wheat growing is a mere property in it will there and without writing, then not applying to such *Sawyer.*

2. Where the promise to third person arises out of consideration of benefit to the promisee, moving either from the promisee debtor, such promise is not a fraud, (1 R. L. the original debt still is entirely unaffected by the *Cleveland v. Farley.*

3. Thus, where M. owed F consideration that M. deliver to the value of the debt, to pay F.; *held*, that this within the statute.

See AGREEMENT.

FRAUDULENT SALES AND CONVEYANCES.

A sale of land by one indebted at the time, in consideration of supporting his family, is fraudulent and void as to creditors; and if a jury find the sale valid as to creditors, a new trial will be granted. *Jackson v. Parker.* 73

See JUSTICE'S COURT, 6, 7.

G.

GUARDIAN AND WARD.

See INFANT.

H.

HANDWRITING

See EVIDENCE, 15.

HEIR.

See ADVERSE POSSESSION, 10.

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HOUSES OF ILL FAME.

See INDICTMENT, 1.

HUSBAND AND WIFE.

1. The wife may convey land to her husband by first aliening, with her husband, to a stranger, who may alien to the husband. Per JONES, chancellor, arguendo in support of his decree. Recognized per STEBBINS, senator, who says an indirect mode of conveyance is no fraud upon the law, when resorted to in order to remedy a want of capacity to convey directly. *M'Cartee v. Orp. As. So.* 437

2. Goods conveyed to a trustee for the use of the wife, places them beyond the control of the husband. Per JONES, Chancellor, arguendo in support of his decree. *id*

See TENANT IN COMMON, 3. USES AND TRUSTS, 2.

I.

IMPUTATION OF PAYMENTS.

See PAYMENT.

INDICTMENT.

1. Every indictment must contain a certain description of the crime, and a statement of the facts, by which it is constituted. An indictment for common barratry is an exception; and a bill of particulars is required. Why indictments of common schools, houses of ill fame, common nuisances, &c. are exceptions. Per SPENCER, senator. *Lambert v. People.* 678

2. *Somb.* the time of committing an offence laid in an indictment is, in general, wholly immaterial, and any other time may be proved. *People v. Van Santvoord.* 655

3. Though an indictment lay the time so long before the indictment is found that the crime appears to be barred by the statute of limitations, this is no ground for arresting judgment. *id*

See CHEATS. CONSPIRACY. ENTRY. FORGERY. PRACTICE IN CRIMINAL CASES

INFANT.

1. An infant having a general guardian, sold a horse belonging to him, the infant; but there was no proof that he delivered the horse with his own hand. The vendee afterwards offered to sell the horse. *Held*, that trover lay by the infant even before coming of age, without any demand of the horse from the vendee. *Stafford v. Roof.* 626

2. And per JONES, chancellor, the sale is void, no manual delivery being shown. The sale and actual delivery of a personal chattel by an infant is voidable before he attains the age of 21 years. Otherwise of land. *id*

INSOLVENT.

See BANKS. CONTRIBUTION, 3. INSOLVENT LAW.

INSOLVENT LAW.

An insolvent law of one of the United States which discharges the person and future acquisitions of a debtor, is constitutional and valid as to contracts made between citizens of such state subsequent to the passing of the law. *Sebring v. Mercereau.* 344

INTERLINEATION.

See EVIDENCE, 19

J.

JEFFERSON COUNTY BANK.

See AFFIDAVIT. PLEAS AND PLEADING,
15 to 18.

JUDGMENTS AND EXECUTIONS.

1. One who is in possession of land under a contract of purchase, has a *real estate* in the land, within the statute, (1 R. L. 506,) which is bound by a judgment in a court of record; and therefore if he assign his interest and possession after judgment, though before a *f. fa.* levied yet the lien of the judgment continuing, his interest may be sold upon the execution. The docketing of the judgment is notice to the purchaser, as in other cases. *Jackson v. Parker.* 73
 2. If the recital of executions in a sheriff's deed of land describe them correctly in several particulars, but add others which are inaccurate, the latter may be rejected as surplusage. All that is necessary is, that the deed show that the sheriff acted under the authority of the executions, even admitting a recital to be important. *Jackson v. Jones.* 182
 3. But the execution need not be set forth or recited in a sheriff's deed; and if recited and described inaccurately, the variance will not affect the deed. *id*
 4. In making out a title under a sheriff's deed, it appeared that the debtor in the execution was in possession several years before it issued, and before the judgment; and that the defendant in the ejectment held under him as tenant. *Held*, that the defendant was estopped to show title out of the debtor. *id*
 5. Where the plaintiff in ejectment made title under a purchase upon execution, against the tenant of the judgment debtor, the tenant being defendant in ejectment, and showed by parol that the defendant confessed he held under the debtor by lease; and the defendant gave evidence that it was a written lease, and then objected that the plaintiff should produce the lease, or show notice to produce it; *held*, that the production of the lease lay with the defendant; and he omitting to produce it, or give legal proof of it, the lease should be taken to have expired, or not to be a subsisting lease, so as to prevent the plaintiff's recovery. *id*
 6. Forms of all the documents necessary in the deduction of title to land under a justice's judgment, viz: The *transcript*, *execution* and *endorsements*, *sheriff's certificate of sale*, and *sheriff's deed*. Note (a) to this case. 182
 7. A deputy sheriff may complete a sale and execute a deed in the name of his principal after the latter goes out of office, if a levy was made before. *Jackson v. Tuttle.* 233
 8. Whether a sheriff can sell lands of a defendant, holden adversely to him when the judgment is obtained? *Quere.* *id*
 9. Lands in a defendant's possession when judgment is obtained against him, may be sold by execution, though at the time of the sale they are holden adversely to him. *id*
 10. One in possession of land has an interest in it which is bound by a judgment, though the title be in another. *id*
 11. S. owning property, pointed it out to a constable as belonging, one fifth of it, to B. against whom the constable had an execution, and was inquiring of the property with a view to the levy. The constable levied, S. receipted the property to the constable, and B.'s right was afterwards sold, and bid off by a third person, *bona fide*, under the execution. S. then sold the property; and in an action by the purchaser for the avails, would have shown that B. had no title, inasmuch as he had not fulfilled a certain contract, on which the one fifth was to vest in him. *Held* inasmuch as notice was not given of the contract to the purchaser, he had a right to purchase upon the faith of S.'s admissions, who should be estopped, under the circumstances, to deny B.'s interest; and that S. should account to the purchaser for the value of the one fifth. *Stephens v. Baird.* 274
 12. Where several parcels of property are sold under an execution at one bid, though the sale might have been fairer, and the property brought more in separate parcels; yet a third person not a creditor has no right to object the manner of sale. The title passes by such a sale as to strangers. *id*
 13. Several instruments in writing and under seal, passing between parties at the same time, shall be taken as parts of the same transaction, and make together but one instrument.
- Thus, where a defendant was, after judgment, surrendered by his bail, but not charged in execution, and wished to visit his family; and the plaintiff consented, and

- acknowledged payment of the judgment, under hand and seal, taking a bond from the defendant, of the same date with the discharge for his return, reciting the surrender and the agreement that he might visit his family, &c.; *held*, that the two papers should be considered together as one instrument, and were not evidence at all, under a plea of payment. *Raymond v. Wheeler.* 296
14. Where one, after a judgment is obtained against him, alienates a part of his real estate on which the judgment is a lien, on motion to the court in which judgment was obtained, or on filing a bill in chancery, the judgment creditor will be compelled, by order or decree, to exhaust the estate remaining in the debtor's hands before selling the part so aliened. *Clowes v. Dickenson.* 403
15. And if the creditor, or any other having the control of his judgment, cause a sale of the aliened estate before resorting to the other, the latter being sufficient to pay his debt, though no order or decree be obtained, he shall restore the real estate to the alienee, or if sold by the sheriff to a *bona fide* purchaser, shall account to the alienee for the value of the real estate aliened, if the other would have satisfied the judgment, or, if not, restore, or account for the value beyond what would, with the other, have satisfied the judgment. *id*
16. And the alienee having stood by, and seen the legal estate pass from him, shall not be allowed the land itself, with improvements made subsequent to the sheriff's sale, and before the alienee of the judgment debtor asserts his claim. *id*
17. The true value of the aliened estate in market, at the time of the sheriff's sale, not the price bid for it at the sheriff's sale, shall form the measure of compensation. *id*
- See COSTS. DEBTOR AND CREDITOR, 2 to 5, DEED, 2, 25, 26. EJECTMENT, 5 to 10, ESCAPE, 4, 5, 6. JUSTICE'S COURT, 1 to 13 PARTITION, 9. TENDER.
- ### JURISDICTION.
- See APPEAL FROM A JUSTICE'S COURT, 2, 3, 4. CHARITIES. JUSTICE'S COURT, 3 to 13. SLANDER, 3.
- ### JUSTICE'S COURT.
1. Form of entry of judgment in a justice's docket. *Smith v. Mumford.* 26
2. An action lies on a justice's judgment, immediately on its rendition, though execution be stayed by the statute. 28
3. To give a justice jurisdiction under a warrant upon the 50 dollar act, (*sess. 47, ch. 238.*) the defendant must be personally arrested, and brought into court before the justice. *Colvin v. Luther.* 61
4. If not, a judgment rendered thereon, though upon a return regular on its face, of the defendant as in custody, and made by his consent, will be *coram non judice*, and void: and all persons acting under it will be wrong doers. *id*
5. The confession of a judgment on the authority of a defendant, as upon a warrant, where he is not in fact arrested and brought before the court, is void. *id*
6. The 13th section of the 50 dollar act, (*sess. 49, ch. 338.*) applies solely to voluntary judgments by confession, without process. *id*
7. By that section, if the confession of judgment be not in writing, with the proper affidavit in particular, the judgment is void as to creditors; and a purchaser of chattels under the defective judgment, with notice of the defect, is not a *bona fide* purchaser within that section, and is liable to a valid levy and sale of the same chattels upon a subsequent execution at the suit of another creditor. *id*
8. In case of a summons, the officer's return of service by reading, gives the justice jurisdiction of the person. *id*
9. Where a court proceeds erroneously, the remedy is by certiorari or writ of error; but where there is no jurisdiction, all is absolutely void, and all concerned in enforcing the judgment are trespassers. *id*
10. The transcript of a justice's judgment, to be filed with and entered by the clerk of the county, pursuant to the ninth section of the statute, (*sess. 41, ch. 94.*) and the 20th section of the statute, (*sess. 47, ch. 238.*) need not show the proceedings before the justice, which respect the regularity of the judgment, or give jurisdiction. *Jackson v. Jones.* 182
11. The transcript being duly entered, is, *per se*, a lien on the lands of the judgment debtor; and proving the transcript, filing and entry, is sufficient in deducing a title by sheriff's sale under a *f. fa.* The jus-

- Wife, or any other proof of the judgment before him, need not be produced. 182
12. A short form of entering a judgment in a justice's court, for the purpose of being transcribed and docketed, so as to bind lands. *Jackson v. Tuttle*. 233
13. The transcript exemplified is *prima facie* evidence of the regular rendition of the judgment, without any other proof; and also that the justice had jurisdiction. *id*

See APPEAL FROM A JUSTICE'S COURT. CERTIORARI. JUDGMENTS AND EXECUTIONS, 6. PLEAS AND PLEADING, 6 to 9.

JUSTICE OF THE PEACE.

1. The legislature have no power to shorten the constitutional term of office of a justice of the peace. *Garey v. People*. 640
2. This cannot be done indirectly by the erection or division of counties. *id*
3. Where a town is transferred from one county to another, or a new county made out of several towns, the justices of these towns continue to hold their offices, as justices of the same town or towns in the new counties. *id*
4. The office of justice of the peace is, under the new constitution and the statute which it adopts, (sess. 41, ch. 60, §2,) a town office, though it has county powers. *id*

L.

LANDLORD AND TENANT.

1. The reservation, in a lease, of all water courses on the demised premises suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto, gives the lessor a right to all the mill seats with the three acres, on the demised premises, whenever he chooses to make a location. It is the same as reserving all the mill seats on the demised premises, with the three acres; but, it seems, would not authorize the lessor to erect a mill or mills on any adjoining lot, flowing three acres on the demised premises. *Russell v. Scott*. 279
2. A lease was of a lot in fee, reserving seven acres, and all water courses suitable for the erection of mills, with the right of erecting mills and other works thereon, with three acres of land adjoining thereto. Then the lessor demised in fee the seven

acres to another lessee. Held, that this last lease did not carry to the lessee the lessor's reserved rights in the first lease. Such rights were not appurtenant to the reserved land. They were an incorporeal hereditament, which will pass only by express grant. 279

3. A written declaration, endorsed on the lease, after the date, by the lessor, that he intended to demise a greater interest than the lease expresses, is not operative to convey any interest. *id*
4. A reservation of a part of a lot demised, leaves that part precisely as though it had not been a part of the lot demised; but had originally belonged to an adjoining lot. *id*

See ASSIGNOR AND ASSIGNEE, 3 to 7. DEED, 6. JUDGMENTS AND EXECUTIONS, 4, 5. MONEY HAD AND RECEIVED, 4, 5. PARTIES, 1.

LEASE.

See LANDLORD AND TENANT.

LEGATEE.

See PARTIES, 2.

LENDING.

See TRESPASS, 2, 3.

LIEN.

See BANKS, 4. DEBTOR AND CREDITOR, 5. JUDGMENTS AND EXECUTIONS, 1, 4, 9, 10, 14 to 17. TENDER. VENDOR AND VENDOR.

LIMITATION, STATUTE OF

1. The erection of a mill dam on one's own land and flowing a neighbor's land for more than 20 years uninterruptedly, bars all right of action in the neighbor; but only for the dam as it stood. If it be raised and the flow increased within 20 years, an action lies. *Russell v. Scott*. 279
2. An acknowledgment of a debt, in order to take it out of the statute of limitations, must clearly refer to the very debt in question between the parties. *Clarke v. Dutcher*. 674
3. Where there is no dispute what the facts are, which are insisted on as taking a debt out of the statute of limitations, their ef-

lect is a question of law. Otherwise where the facts are doubtful upon the evidence. The question is then one mixed of law and fact. 674

in support of his decree. *McCarter v. Orphan Asylum Society.* 437

MILITARY BOUNTY LANDS.

4. A lessor had, for a great number of years, received of his tenant annually a few shillings more rent than was due; and his tenant at length sued him before a justice for the excess he had paid, some having been paid more, and some less than six years before suit brought. The lessor asked the tenant, before declaration put in, why he had sued him? who told him he had sued him for the excess of four or five shillings per year; and the lessor replied, "It has been an old custom of mine to take so much." The tenant asked him if custom made law? He said he did not know that it did in this case. *Held*, that this did not amount to such an admission as would take the claim out of the statute of limitations. *id*

See ADVERSE POSSESSION. DEED, 23, 24.
MILITARY BOUNTY LANDS, 6, 7. PARTITION, 10, 11. TENANT IN COMMON, 6, 7.

LOTTERY TICKET.

See TROVER, 5.

LUNATIC.

See ADVERSE POSSESSION, 6.

M.

MAPS.

See EVIDENCE, 17.

MARRIAGE.

See TENANT IN COMMON.

MASTER IN CHANCERY.

See PRACTICE OF CHANCERY.

MAXIMS.

The rule that what cannot be done directly shall not be done indirectly, applies only to an act prohibited by statute, or one which is morally wrong, or one which is intended as a device to evade an express provision or rule of law. It has no application to mere incapacity, when the act to obviate the incapacity contravenes no statute regulation, nor violates any principle of law. *Per JONES*, chancellor, arguing

1. Specimen of an entry in the balloting book, of land drawn to a revolutionary soldier. *Jackson v. Cody.* 140

2. This is the authority for a patent. *Per SUTHERLAND*, J. delivering the opinion of the court. *id*

3. A registry of deeds of military bounty lands by the clerk of Albany, appears by the case, to be merely setting down the names of the grantors in a book, in order, as directed by the act of January, 1794, not copying or recording the whole deed, as under the general registry acts. *id*

4. Where a patent of land was granted to a soldier, who died intestate without children, and leaving a father and brothers, before our statute of descents, in consequence of which the land descended to his elder brother as at common law, who conveyed the land on the 20th of November, 1795, subsequent to the statute of descents, to a *bona fide* purchaser; *held*, that the grantee of the brother should be preferred to the subsequent grantee of the father, who would have been preferred by the statute of descents; this being a case within the exception of the 8th section of the statute of 1803, (secs. 26, ch. 88,) and 7th of the act of 1813, (1 R. L. 305.) The words, held by *bona fide* purchasers or devisees, used in those acts, do not contemplate an actual possession and improvement of the land; but any one holding the legal title. *Jackson v. Mumford.* 254

5. The act of the 6th of April, 1790, (secs. 13, 24, 59,) relative to the military bounty lands, section 5, (2 Greenleaf, 332, 334,) did not validate a patent to a soldier who was not alive on the 27th day of March, 1783; so that nothing could pass by such a grant, (19 John. 198, S. P.) *Jackson v. Lyon.* 664

6. By the act of the 3d of April, 1807, (secs. 30, ch. 114, 5 W. L. N. Y. 124,) which vests the lands patented to John McCloughry, a deceased soldier, in his heirs, though aliens, in like manner as it would have descended to them, if they had been citizens of this state at the time of his death, (1781,) according to the law of descents of this state, it was intended that the heirs should take according to the law of descents at the time of passing the act. (19 John. 198. S. P.) *id*

7. The title of J. M.'s heirs, therefore, as it respects any limitation, is to be deemed to have accrued from the time of passing the act. (19 John. 198, S. P.) 664

8. But the act of April 5th, 1823, (sess. 26th, ch. 88, 3 W. L. N. Y. 399, s. 1.) vested military bounty lands theretofore granted, in the officer or soldier, as at the time of his death, whenever that happened; thus constituting him a stock of descent, and passing the land to his heirs *ex parte paterna*, and for default of them, then *ex parte materna*; and the legislature could not, by the act of 1907, divest the title of the latter heirs. *id*

9. The state has no power to divest the title vested in one set of heirs, and pass it to another; e. g. from the heirs, *ex parte materna* to those who, but for their alienism, would have been heirs *ex parte paterna*. *id*

10. In ejectment, the plaintiff claimed title under the alien heirs of a deceased soldier, such heirs being declared capable of taking by a statute of 1807: but which statute was void because the title had, in 1781, on the death of the soldier, vested in his heir *ex parte materna*. The defendant, who claimed title under a deed from one of the alien heirs, showed the outstanding title, but did not connect himself with it; nor did he show that the heir *ex parte materna* had ever entered or claimed the land, from 1803, when his title accrued, to 1822. *Held*, no defence; and that the plaintiff should recover the rights of those alien heirs who had not conveyed; on the ground that the outstanding title was not shown to be a subsisting one; and a conveyance from the heir *ex parte materna* might be presumed. *id*

See DEED, 13 to 24.

MILITIA.

See PLEAS AND PLEADING, 35.

MILL DAM.

See LIMITATIONS, STATUTE OF, 1.

MISTAKE.

See DEED, 37.

" MISTAKE OF LAW.

See MONEY HAD AND RECEIVED, 4, 5.

MONEY HAD AND RECEIVED

1. To warrant a recovery as for money and received, paid under a special contract (e. g. a contract to convey land) a strict performance must be shown by the plaintiff the same as if he had sued on the contract itself, unless the contract be expressly rescinded, or impliedly so, nothing having been done under it for time, or the party sought to be shown having acted inconsistent with it. *v. Green*.

2. Thus, where a party covenanted to pay money for land by instalments, on comp which he was to have a deed, and by possession, and continued it for some making partial payments, but finally to pay, and the vendor took possession an action for money had and received cover back the money paid, *held*, it would not lie.

3. And the covenant to pay being independent, *held*, no breach that the defendant never any title to the land; for *non est* had the plaintiff paid, that the defendant might not have procured a title conveyed.

4. Where money is paid with a full knowledge of the facts and circumstances upon which it is demanded, or with the means of knowledge, it cannot be recovered back on the ground that the party supposed himself bound in law to pay it, when in truth was not. He shall not be permitted to allege his ignorance of the law; and it be considered a voluntary payment. (*v. Dutcher*).

5. Thus, where a tenant paid rent to his lord, at the rate of £4 14s. currency, 10s. sterling, the rent being reserved in the lease for money, *held* that he could not recover back the excess.

See TROVER, 5.

MORTGAGE.

1. Van D. having purchased lands of Van R. for which he had not paid, sold part of the land to W., from whom he took two mortgages of equal date, for parts of the consideration, intending that one of the mortgages should be assigned to Van R. to secure original consideration of the land, and it should have priority. This was put to an understanding and arrangement between Van R. and Van D. when the first was conveyed. The mortgages were registered concurrently; but the one intended for Van R. was first assigned to him, and afterwards

- the other was assigned to S. in good faith, for full value. *Held*, that the mortgage assigned to Van R. took preference. *Stafford v. Van Rensselaer.* 316
2. S. took the other mortgage, subject to all the equity which Van R. had against the mortgagee. *id*
3. The statute of registry has no application to such a case, as between the two assignees. *id*
4. Van D. took the mortgage assigned to Van R. as trustee of Van R. *id*
5. Van D. was a competent witness for Van R. in a suit between him and S. *id*
6. A decree of foreclosure and sale of premises mortgaged in fee, is a complete bar of the equity of redemption, though the mortgagee become a purchaser. *Lansing v. Goelet.* 346
7. So is a decree of sale without any express decree of foreclosure. *id*
8. Where the premises, on sale, bring only a part of the mortgage debt, the mortgagor may collect the deficiency by judgment and execution on the collateral bond; and this shall not open the foreclosure, or restore the equity of redemption. *id*
9. The principle and history of the practice, in this state, of selling mortgaged premises, instead of strict foreclosure; and a view of the English and American authorities on that practice, with the statutes of New York relating to the same practice. *Per Jones, Chancellor, arguendo, to the court of errors, in support of his decree in chancery.* *id*
10. W. holding a mortgage against C. & S. to secure about 6000 dollars, became indebted to them in 3000 dollars on an open account; after which, R. recovered a judgment against C. & S. W. subsequently assigned his mortgage to the bank of N. without endorsing or crediting the 3000 dollars. R. tendered to the bank the amount supposed to be due on the mortgage, and more; and filed a bill for redemption and assignment to him, for an account, and to have the 3000 dollars allowed on the mortgage. *Held*, that the 3000 dollars should be allowed as a set off. *Niagara Bank v. Roosevelt.* 409
1. Till judgment, the parties to the mortgage might have applied the set off to the mortgage, or not, at their election. But by the judgment, the right of set off became absolute in the judgment creditor. *id*
12. The assignee of a mortgage takes it subject to all equities existing against it in the hands of the mortgagor; and, among others, the right of set off. 409
13. A creditor whose judgment is a lien on an equity of redemption, on coming to redeem has a right to the assignment of the mortgage. *id*
- See ASSIGNOR AND ASSIGNEE, 8 to 12.
EJECTMENT; 9.
- N.
- NEGLIGENCE.
- See ATTORNEY.
- NEW TRIAL.
- A new trial will not be granted, on the ground of newly discovered evidence, when that evidence is merely cumulative. *Whitbeck v. Whitbeck.* 266
- See FRAUDULENT SALES AND CONVEYANCES.
- NONJOINER.
- See ABATEMENT, 1.
- NUISANCE.
- See INDICTMENT, 1.
- O.
- ORDER FOR GOODS.
1. An order drawn on a depositary of goods by the owner, to deliver them to a third person, and accepted by the depositary, is a sale of goods according to the terms of the order, by the drawer to the deliverer. *Bailey v. Johnson.* 115
2. An order on a depositary to deliver goods, is valid without saying for value received, or proving value received, especially if accepted by the drawee. It will be intended that the deliverer is beneficially interested, and not a mere agent of the drawer. *id*
3. Where there is doubt as to the terms of an order in the hands of the party sought to be charged by it, and he refuses to produce it, putting his antagonist to peril proof, the

presumption shall be against him that the order is in the terms insisted on by his antagonist. 115

that the arguer.

4. A parol acceptance of an order from the owner of goods, by his depository, is valid and binding on the depository, according to the terms of the order. *id*

5. A cause hearing ties, ins objected Judge.

5. An endorsement by a deliverer, and a delivery of an order for goods, with intent to assign it, operates as a valid assignment. *id*

See DEBTS AND AD

6. An endorsement and delivery, with intent to assign, by the deliverer, of an order for goods, drawn in his favor by the owner on his depository, who accepts the order, is a sale of the goods, and such a sale is a good consideration for a promise. *id*

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See PLEAS AND PLEADING, 10.

OYER AND TERMINER.

See COURT OF OYER AND TERMINER.

P.

PARTICULARS.

See ABATEMENT, 2.

PARTIES.

1. An aged man, whose children live with him and support him, working his farm, but without any contract giving them or any of them, the exclusive possession, is still so possessed of his farm, in the eye of the law, as to enable him, as possessor, to maintain an action for any injury to the farm. *Russell v. Scott.* 379

2. A partit the parti by name, of convey ers away sentative the parti the perso

3. A court chaser to for specif closure of apply to titution. Sel

4. Judgmens cers are n titution, eve decreed; in such ca that the b

2. *Semb.* persons beneficially interested, e. g. legatees, may sue in their own names, without the aid of an administrator *de bonis non*, those dealing with an executor, knowing that such dealing is a misapplication of the testator's property. *Per Betts, C. Judge, sitting for the chancellor and reasoning in support of his decree.* *Colt v. Lasnier.* 320

5. In a proc under the 107.) alleg petitioners sole seisin presented, ing the sei titution. *Rep* seised in n petition. *H* partition u incumbent prove that the time of meaning o gham.

3. The general rules as to who are necessary parties in a court of equity, adverted to as laid down by different chancellors and judges. *Per Betts, C. Judge, sitting for the chancellor, and reasoning in support of his opinion that a new party should be introduced.* *id*

4. The ordinary course in chancery, where a want of proper parties appears at the hearing, is for the cause to stand over in order

6. *It seems th* the plaintiff he is seise

possession; and that a mere right of entry will not satisfy the averment; and that, consequently, a subsisting adverse possession of the defendant, though short of twenty years, is a bar. 530

7. It seems that a *disseisin* or an *adverse possession*, though they may, in some respects differ in meaning, will either of them, as between tenants in common, destroy their common possession, and thus bar a suit for partition between them; and either will, after 20 years, bar the entry of the tenant in common, who is out of possession. *id*

8. But if adverse possession differ from *disseisin* in this: that the adverse possession of one tenant in common will not divest the *seisin* of the other tenants in common till it tolls their entry; yet after it continues 20 years, thus tolling their entry, and leaving them a mere right, it then destroys the common *seisin*, and so bars a writ of partition, or a proceeding for partition under the statute, (sess. 36, ch. 100, 1 R. L. 507.) The co-tenants out of possession are thus put to their writ of right, to recover their share and gain their *seisin*, before they can maintain partition. *id*

9. A judgment in partition does not change the possession; but in an ejectment of writ of right, it would be conclusive between the parties. *id*

10. On a bill for partition in chancery, possession of 20 years, adverse to the plaintiff, being interposed, the cause must stand over for a trial of the title at law. *PER JONES, Chancellor, delivering the opinion of the court.* *id*

11. When in a proceeding in partition under the statute, (sess. 36, ch. 100, 1 R. L. 507,) there is evidence of a possession 20 years before suit, adverse to the petitioner, the jury should be instructed that, if they find such adverse possession proved to their satisfaction, they should render their verdict for the defendant. *id*

See DEED, 28.

PARTNERS AND PARTNERSHIP.

1. The admission of one partner, either of an account or any fact, made after the dissolution of the partnership, is not admissible as evidence, to affect any other member of the firm. *Baker v. Stackpoole.* 420

2. Partners in the practice of physic are within the law merchant, which excludes the *jus accrescendi* between traders. *Allen v. Blanchard.* 631

3. The widow of a deceased partner is not a competent witness for the surviving partner, in an action by him as such. 631

4. Nor will a release from her to him of all her interest in the particular claim, render her competent. Whether such a release would bar her claim to a share of the sum recovered, it not being to the personal representatives of her husband? *Quere.* *id*

5. Where a suit is brought by a surviving partner as such, if he fails, the estate of the deceased partner is liable to contribute to the costs; and the assets of a deceased partner are liable for the debts of the firm, if they cannot be collected of the survivor. *id*

See EVIDENCE, 22.

PATENT.

See EVIDENCE, 23. MILITARY BOUNTY LANDS, 2, 4.

PAYMENT.

1. A general payment by a debtor who owes his creditor on two accounts, may be applied by the latter to either. *Per Woodworth, J. delivering the opinion of the court.* *Niagara Bank v. Roosevelt.* 409

2. But if one of the debtor's liabilities be contingent, as if his creditor be his endorser or surety, not having paid the money, the latter cannot apply the money paid to this account. *Per Woodworth, J. delivering the opinion of the court.* *id*

3. A person indebted to the same creditor on different accounts or demands, and making payment, may apply the payment to which account or demand he pleases; and if he fails to make the application, the creditor may apply the payment to which account or demand he pleases. *Baker v. Stackpoole.* 420

4. Where neither party makes an appropriation, the law will appropriate the payment upon certain rules of presumption. The authorities to this point examined. *id*

5. Where *A.* has a demand against *B.* and *C.* and a more recent demand against *B.* alone, who makes an indefinite payment, *scilicet*, the law will appropriate the payment first to the extinguishment of the individual demand; and then the residue, if any, to the extinguishment of the joint demand, though if both demands were against *B.* alone, it might appropriate the payment first to the extinguishment of the oldest debt. *id*

6. But in such case A. cannot wait, after the payment, till E. becomes farther indebted, and then appropriate the payment to the extinguishment of the newly created demand, leaving the previous demands unpaid. 420

7. In no case can a creditor who receives payment generally, retain and appropriate it to the extinguishment of a demand created after the payment, leaving a prior demand unpaid. *id*

8. If a debtor owes his creditor several debts upon distinct causes, and pays him a sum of money, he (the payor) has a right to say to which debt or debts the money shall be appropriated, provided he directs this at the time of the payment; but if he does not so direct, the creditor may apply it as he pleases. And *semel* where it is, in the nature of the thing, indifferent to the debtor to which debt the payment shall be applied, and the debtor does not direct, the creditor may make the application at any time after the payment. *Pattison v. Hull.* 747

9. Where the debts due by a debtor to his creditor are of different characters, and a general payment is made, and neither party applies the payment at the time, the law will then apply it, upon the presumed intention of the debtor, to that debt, a relief from which will be most beneficial to him. *id*

10. Thus, if the debts be a mortgage and account, or judgment and account, the law will apply the payment to the mortgage or judgment in preference to the account, because the former would bear most heavily on the debtor. *id*

11. Parallel between the civil and common law as to the application of payments. Note (b) to this case. *id*

See BANKS. CONTRIBUTION.

PERJURY.

See SLANDER, 3.

PLEADINGS IN CHANCERY.

In chancery, a defendant (like a witness at law) is not bound to answer to facts which may criminate or subject him to a penalty. He may demur to the discovery; but this does not affect the relief. *Per STENNIS, senator. Lambert v. People.* 578

PLEAS AND PLEADING.

1. Precedent of a declaration for fraud in the

sale of a chattel, both as to form and substance. *Corwin v. Davison.*

2. In declaring for a fraud in repressing machine, on sale of the patent right payable, if constructed and worked as directed by the defendant, of performing a quantity of labor, and averring that so constructed it would not perform work; *held*, that it is unnecessary to set forth the manner of the construction

3. The consideration of the sale need set forth particularly. It is enough a valuable consideration was paid, the plaintiff satisfied the defendant, any thing more.

4. It is enough to aver that the defendant frauded the plaintiff, without showing means he used.

5. In declaring for a fraud in the sale of a chattel, it is not necessary to set out the contract or consideration. Action on special demurrer. *id*

6. Precedent of a declaration in debt judgment in a justice's court. *See Mumford.*

7. It is sufficient to say that the party avers so much (a sum within the jurisdiction,) for such a cause, (being within his jurisdiction,) without setting forth any of the previous proceedings

8. The declaration on a justice's judgment averred a recovery for a debt, and 10 cents for the party's damages, as a reason of detaining the debt, as for his &c. Proof of \$50 debt and 93 cent *Held* no variance.

9. The terms used in the declaration in costs only.

10. An order was to deliver goods to B. pleading, it was averred that the goods to be delivered to B. or order; *held*, in answer, the words or order not being material set forth as matter describing the demand. *Bailey v. Johnson.*

11. In assumpsit, where the plaintiff declares in several counts, he cannot be compelled on the trial to elect which count he proceeds upon. *Norris v. Durham.*

12. Where the declaration contains upon a special contract unexecuted, is proved, and an extension or alteration of the contract is shown, the plaintiff cannot recover at all, because of variance

13. Four counts were on a special contract to carry, and the fifth against the defendant as a common carrier. The special contract to carry being proved, and evidence given to vary the terms of it, *held*, the jury should be charged that if they believed the parties had varied the terms of it, they should find for the defendant; for he would not be liable as a common carrier, but only on the special contract. 151
14. The omission to assign a breach to one of several counts in assumpsit, is aided by the verdict, and may be amended. *Wood v. the Jefferson County Bank.* 194
15. The requisites to give the Jefferson County Bank existence as a corporation according to the statute, (secs. 39, ch. 231,) pleaded and set forth particularly in reply to a plea of *nul tiel corporation*, put in at the suit of the bank, and issues taken upon those several requisites in a rejoinder. *id*
16. Though a party, in pleading matters which constitute his right, (*e. g.* the organization of a bank under its charter) set forth more matters than are necessary, upon which, with those that are necessary, issue is joined, yet he need prove those matters alone which are necessary. *id*
17. Thus, where a bank having sued on a note, replied to a plea of *nul tiel corporation*, (instead of demurring as it might,) setting forth all the steps made necessary by the act, (secs. 39, ch. 231,) to give it existence as a corporation, with divers others; upon all which matters issue was joined; yet *held*, that at the trial, it need prove no more than would be necessary upon the general issue. *id*
18. The plea of *nul tiel corporation* is bad on special demurrer. *id*
19. Though the legal effect of altering, by consent of parties, the time limited to do an act (*e. g.* to make an award) in the condition of a bond, leaving the original date to stand, is to destroy the bond as a pre-existing one, and to give it effect only from the time of the alteration, yet the bond may be declared on as bearing its original date, with or without an averment that it was delivered afterwards. *Tomkins v. Corwin.* 255
20. A bond for performing an award was dated the 19th of *September*, 1825, and conditioned that the award should be made, &c. on or before the 31st of *December* then next; and afterwards the parties extended the time for the award twice, by erasure and interlineation; and the last time, to the 18th of *January*, 1826. *Held*, that the plaintiff might either declare on the bond simply, as both *dated and made on the 19th of September*, or as *dated that day and made afterwards.* 255
21. Where the merits of the case are affected by the time when a deed becomes valid, the time of delivery should be stated and shown; for the delivery gives it effect as a deed. Otherwise, where time is immaterial. *id*
22. A contract may be set forth in pleading according to its legal effect, though this vary from the precise words. *id*
23. A deed executed on a particular day, may in general be pleaded as made on any other day. *id*
24. The supreme court have often held, that in pleading time, the words *next* or *then next* may be considered as referring to the *day* of the month, and not the *month* itself. *id*
25. A plea to an avowry or cognizance need not allege any place of taking. It is enough that it refer to the property mentioned in the declaration and avowry or cognizance. *Judd v. Fox.* 259
26. The declaration in replevin stated the chattels to be the *property* of the plaintiff, and to have been taken from the building of a third person. Avowry and cognizance. Plea to the avowry and cognizance, that the *property and possession* of the chattels were in the plaintiff. *Held*, no departure from the declaration; for the plea did no more than render certain what was not in terms alleged by the declaration; but which was perfectly consistent with it. *id*
27. A special plea in bar, affirming a fact in avoidance of the action, admits the cause of action stated in the declaration. (*E. g.* plea of payment to a declaration on a judgment.) *Raymond v. Wheeler.* 295
28. In pleading, a fact asserted on one side and not denied on the other, is admitted. *id*
29. *Non est factum* puts in issue the execution of the deed only. Every material averment, beside that of execution, is admitted. *Dale v. Roosevelt.* 307
30. And this, though the plaintiff stipulate that, under the plea, the defendant may give any special matter in evidence as if pleaded. *id*

31. What may be given in evidence upon *non est factum*. Per SAVAGE, Ch. J. in assigning reasons, and per DATAN, senator. 307

32. The declaration was on a covenant to pay \$4,400; breach, that the defendant had not paid \$4,000; and, per VIELE, senator, this is a good breach. *id*

33. It merely limits the damages to the amount of the breach assigned. *id*

34. The covenant with the plaintiff was to pay the U. S. \$1,150, and the plaintiff the residue, in notes at 6, 12 and 18 months; breach that the covenantor had not paid the plaintiff in the manner mentioned in said agreement; *held*, a good assignment of breach. *id*

35. The proceedings, sentence, execution and levy and sale under the sentence of a regimental court martial, pleaded and set forth in an avowry and cognizance, of goods and chattels taken in virtue of the execution. *id*

See APPEAL FROM A JUSTICE'S COURT, 2, ARREST OF JUDGMENT, 2, 3. CONSPIRACY. COSTS, 2. ESCAPE, 1, 2, 3. INDICTMENT. PARTITION, 5, 6. PLEADINGS IN CHANCERY. SCIRE FACIAS. SET OFF. SLANDER, 1.

PLEDGING.

See TROVER, 1.

POSSESSION.

See EJECTMENT, 1, 11. EVIDENCE, 1.

PRACTICE.

Where counsel rose to address the jury, and the judge told him he should charge against him, and he did not, therefore, address the jury; *held*, that this was a voluntary relinquishment of the right to address them, and not compulsory by the decision of the judge. JACKSON v. CODY. 140

See AMENDMENT. APPEAL FROM THE COURT OF CHANCERY TO THE COURT OF ERRORS. ARREST OF JUDGMENT. DEED, 37. EJECTMENT, 10. ERROR. EVIDENCE, 9 to 12, 28, 30, 31. PRACTICE OF CHANCERY. PRACTICE IN CRIMINAL CASES. RULES.

PRACTICE OF CHANCERY.

1. Where a bill against several defendants makes an admission favorable to some,

against whom the bill is taken *pro confesso*, but the admission is unfavorable as to others, who appear and take issue, and disprove it, it must yet be taken as true in respect to those who did not answer. PATTERSON v. HULL. 747

2. Thus, where a bill for foreclosure of a mortgage stated that the first instalment which fell due on the mortgage had been paid, to which bill the mortgagors and divers incumbrancers were made parties; and one set of incumbrancers appeared and claimed that the instalment had not been paid, but was due and belonged to them, and claimed that the foreclosure should proceed as well for that as the residue of the mortgage debt; and established this claim in proof; but the bill was taken *pro confesso* against all the other defendants; *held* that, as to the latter, the instalment must still be taken as paid, though otherwise as between the parties litigant. *Semb.* that to warrant a foreclosure for the whole debt against all the defendants, a cross bill should have been filed. *id*

3. *Semb.* a cross bill is always necessary where the defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him. *id*

4. A decree of sale on foreclosure of a mortgage is not to be made till the master's report on the account shall be confirmed. *id*

5. A master may, after a hearing before him on reference is closed, and before he has settled the draft of his report, receive further evidence, if he be satisfied that it was discovered after the first hearing. *id*

See COSTS IN CHANCERY. PARTIES, 2, 3, 4, 5. PARTITION, 3, 4, 10.

PRACTICE IN CRIMINAL CASES.

Practice and practical forms of removing an indictment from the oyer and terminer to the supreme court, after conviction, where a question of law is reserved at the trial, and the convict is in prison. *Vide notes (b) (c) and (d) in connection with the principal case.* PEOPLE v. VAN SANTVOORD. 655

See WITNESS, 4 to 10.

PRACTICE OF THE COURT OF ERRORS.

See RULES.

PRINCIPAL AND SURETY.

1. It is no answer for the sureties in an action on a bond by a deputy sheriff given to

the sheriff, for the faithful performance of the duty of the deputy, &c., that before the alleged default of the deputy, he had become insolvent, in consequence of which the sureties requested the sheriff to remove him from his office. *Andrus v. Bealls.* 693

2. It is no defence for sureties in an action on their bond of indemnity, that the obligee neglected to defend the suit against him, by which he was damnified within the terms of the bond. *id.*

3. Thus, where a deputy sheriff collected money on a *f. fa.* and neglected to pay it over; and the sheriff being attached for not returning the writ, paid the money voluntarily, without defending the attachment suit; yet *held*, that the sureties in the bond of indemnity given by the deputy to the sheriff, were liable. *id.*

See CONTRIBUTION.

PROMISE

A promise in writing unsealed, not for the payment of money, is void, unless it either express a consideration, or some consideration be shown by averment. *People v. Shall.* 778

See FORGERY, FRAUDS, STATUTE OF, 2, 3.

PROMISE OF INDEMNITY.

1. A promise to indemnify against a trespass is valid, unless the promisor show that the promisee knew the act to be a trespass and illegal. *Stone v. Hooker.* 154

2. A promise to indemnify one against a trespass, includes an authority to the promisee to employ and indemnify agents; and if he is compelled to pay such agents damages recovered against them for the trespass, he may recover over against his promisor, the same as for damages paid by the promisee directly, to the person trespassed upon. *id.*

3. Where such agents were severally sued by the person trespassed upon, the original promisor having notice, one of them, after trial and recovery against another gave a *cognovit* in his own suit, and paid, and his promisor paid him; *held*, the agent appearing to have acted in good faith, that the original promisee might recover the amount of what he thus paid. *id.*

4. A warrantee of land may abandon possession without suit; and if the title be in fact defective, may still recover against his war-

rantor; but the burthen of proof, as to want of title, lies, in such case, on the warrantee. *Per cur. arguendo*, on the authority of *Hamilton v. Cutts*, (4 *Mass. Rep.* 349.) 154

5. One promises to indemnify another against a trespass. On suit for the trespass, the latter gives a *cognovit*. The burthen lies with him to prove the *cognovit* was not for too much. So if the agent of the latter give a *cognovit* for a sum which his principal pays. *id.*

PROMISSORY NOTE.

1. A holder of a promissory note giving time to the maker, to the prejudice of the endorser, discharges the latter. *Wood v. Jefferson County Bank.* 184

2. An agreement with the maker to prosecute the endorser, and if the debt cannot be collected, then to receive security from the maker at two years, does not suspend the right to sue the maker at any time before the suit against, and failure to collect of the endorser. *id.*

3. Whether a cashier of a bank holding a note, has power to make an agreement to suspend the payment of the note without the consent of the directors? *Quere.* *id.*

Q.

QUESTIONS OF LAW AND FACT.

See ADVERSE POSSESSION, 17. ERROR, 4, 6. EVIDENCE, 9 to 12, 40, 41, 42, 45, 46. LIMITATIONS, STATUTE OF, 3.

R.

RECITAL.

See EVIDENCE 14, 20. JUDGMENTS AND EXECUTIONS, 2, 3.

REGISTRY OF DEEDS.

See DEED, 2, 3, 4, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 26. EVIDENCE, 30, 31, 32, 33. MILITARY BOUNTY LANDS, 3. MORTGAGE, 1, 2, 3.

REGULÆ GENERALES.

See RULES.

RELEASE.

1. An agreement or covenant not to sue one of several promissors, is no release of the others, though made upon good consideration. *Catskill Bank v. Messenger.* 37

2. Otherwise of a technical release. 37

See EVIDENCE, 21, 22. EXECUTORS AND ADMINISTRATORS, 1. PARTNERS AND PARTNERSHIP, 4.

REPLEVIN.

Replevin lies for goods taken in execution; they not being, at the time, in possession of the debtor in the execution. Otherwise, if in his possession. *Judd v. Fox.* 259

See PLEAS AND PLEADING, 25, 26, 35.

REPRIEVE.

See COURT OF OYER AND TERMINER.

RESERVATION.

See LANDLORD AND TENANT, 1, 4.

RES GESTÆ.

See EVIDENCE, 44.

RULES.

General rules of the court of errors, adopted April 16th, 1827. 287 to 293

8.

SALE AND DELIVERY OF GOODS.

See FRAUDS, STATUTE OF, 1. INFANT. ORDER FOR GOODS, 6.

SCIRE FACIAS.

Record of proceedings in *sci. fa.* on a judgment in debt on the surety bond of a deputy sheriff, including the writ or declaration, pleas, &c. *Andrus v. Bealls.* 683

SEAMEN.

See SEAMEN'S WAGES.

SEAMEN'S WAGES.

1. Wages cannot, in general, be recovered by a seaman, where no freight has been earned, and there is no fault of the master or owners occasioning the failure. *Van Beuren v. Wilson.* 158

2. It is not sufficient to entitle seamen to wages, that the freight be lost without their fault. It must be owing to the fraud or other wrongful act, or some fault of the

master or owner; or at least some act or omission on the part of the master or owner over which the seamen can have no possible control. 158

3. The defendant shipped the plaintiff, a seaman, on a voyage from *New York to Newry in Ireland*, and thence back to a port in the *United States*: and the vessel was libelled in the *Irish* admiralty by one pretending to be owner, and the crew turned ashore, and discharged by the captain. The vessel was detained more than a year, and was finally restored; but, in the mean time, had become so much deteriorated as to be unworthy of repair, and was abandoned in *Ireland* to the underwriters, and never returned to the *United States*. Held, that this was not the exercise of that superior force over the vessel, which should exempt the owners from liability to pay the plaintiff his wages, or damages for discharging him from the return voyage; and held, also, that the master and owners were not entirely free from fault; that they were bound to understand and risk their title; or, if it was contested in a mere civil proceeding, to take effectual means for liberating it, if possible, on security, *pendente lite*; so as to prosecute the voyage, and enable the vessel to earn freight. *id*

4. An action will not lie at the suit of a seaman against the owners, under the act of congress, (7 Cong. sess. 2, ch. 62, § 3.) And see *Ogden v. Orr*, (12 *Johns.* 143, *S. P.*) *id*

SEISIN.

See PARTITION, 5, 7, 8.

SET OFF.

1. In an action on a judgment in the name of a judgment creditor, for the benefit of an assignee of the judgment, the defendant cannot set off a debt due to him from the assignee. *Raymond v. Wheeler.* 295

2. A plea of set off is inadmissible under the statute, (1 *R. L.* 515.) The defendant can avail himself of a set-off by notice only with the general issue. *id*

3. In an action by one in his own name, for a debt due to him in trust for another, the defendant cannot set off a demand against the *cestui que trust*. *id*

4. Where *W.* assigned a judgment in his favor to *L. & K.*, who gave notice to the debtor, and then assigned to *R.*, who assigned to another, notice of the two last assignments not being given to the debtor, in debt on this judgment by the last as-

signee, in the name of *W.*, held, that the debtor could not set off a demand due to him from *R.*, though it was due from *R.* while he owned the judgment. 295

See BANKS, 5, 6, 7, 8, 9, 10, 11. MORTGAGE, 10, 11, 12.

SHERIFF.

See ESCAPE. JUDGMENTS AND EXECUTIONS, 7, 8. PRINCIPAL AND SURETY.

SHERIFF'S DEED.

See JUDGMENTS AND EXECUTIONS, 2, 3, 6, 7.

SHERIFF'S DEPUTY.

See JUDGMENTS AND EXECUTIONS, 7. PRINCIPAL AND SURETY. SCIRE FACIAS.

SLANDER.

1. In slander, where the words are not actionable in themselves, but become so by extrinsic circumstances, these must be averred and proved. *Bullock v. Koon.* 30
2. The best evidence must be produced; and where the charge was of swearing false before arbitrators, and the submission appeared to have been by bonds; held, that they must be produced, and the submission could not be shown by parol. *id*
3. In such case, as on an indictment for perjury, enough must be shown to give the court or magistrate administering the oath jurisdiction. Enough must be proved, also, to show the materiality of the testimony. *id*

SOLDIER.

See MILITARY BOUNTY LANDS.

SPECIAL PROPERTY.

See TROVER, 3.

STATUTE

Two statutes shall stand together, and both have effect if possible; for the law does not favor repeals by implication: and all acts *in pari materia* should be taken together, as if they were one law. *M'Cartee v. Orphan Asylum Society.* 437

See AFFIDAVIT. CORPORATION, STATUTES CONSTRUED, EXPLAINED, OR CITED.

STATUTES CONSTRUED, EXPLAINED, OR CITED.

1813,	April 2, Sess. 36, ch. 50, 1 R. L. 506	(Judgments and Executions.)	73
1794,	January 8, Sess. 17, ch. 1, 1 R. L. 209.	(Military Bounty Land.)	94, 140
1794,	March 7, Sess. 17, ch. 44, 1 R. L. 211.	(Military Bounty Land.)	94
1780,	February 26, Sess. 11, ch. 44, 2 Greenleaf, 99.	(Deeds.)	94
1820,	April 14, Sess. 43, ch. 245, § 8.	(Deeds.)	94
1813,	April 12, Sess. 36, ch. 97, § 1.	(Deeds.)	94
1813,	April 12, Sess. 36, ch. 97, § 4.	(Deeds.)	120
1818,	April 10, Sess. 41, ch. 94, § 9.	(Transcript of Justice's Judgment.)	182
1824,	April 12, Sess. 47, ch. 238.	(Transcript of Justice's Judgment.)	182
1816,	April 17, Sess. 39, ch. 231.	(Jefferson County Bank.)	194
1785,	March 16, Sess. 8, ch. 39.	(Partition.)	241
1803,	April 5, Sess. 26, ch. 88, § 8.	(Descents.)	254
1813,	April 8, Sess. 36, ch. 80, § 7, 1 R. L. 305.	(Descents.)	254
1813,	April 5, Sess. 36, ch. 56, § 1, 1 R. L. 515.	(Set off.)	295
1813,	March 10, Sess. 36, ch. 32, § 1, 1 R. L. 372.	(Mortgages.)	316
1825,	April 21, Sess. 48, ch. 325, § 17.	(Insolvent Bank.)	409
1813,	March 5, Sess. 36, ch. 23, § 1, 1 R. L. 364.	(Wills.)	437
1813,	April 12, Sess. 36, ch. 100, 1 R. L. 507.	(Partition.)	530
1787,	February 26, Sess. 10, ch. 44, § 11, 1 R. L. 78.	(Frauds, Statute of.)	639
1820,	April 12, Sess. 43, ch. 184, § 3.	(Judgments and Executions.)	641
1790,	April 6, Sess. 13, ch. 59, § 5, 2 Greenleaf, 333, 4.	(Military Bounty Land.)	664
1807,	April 3, Sess. 30, ch. 114.	(Land granted to John M'Loughry.)	664
1803,	April 4, Sess. 26, ch. 88, § 1.	(Descent.)	664

SURETY.

See PRINCIPAL AND SURETY. USURY, 3 7

T.

TENANT IN COMMON.

1. On the death of a man, intestate, leaving personal property, of which one of two distributees takes possession, he is a tenant in common with the other: and trover will not lie at the suit of the other, unless the

property be sold or destroyed by the possessor. *Hyde v. Stone.* 230

2. One tenant in common cannot like a partner, sell the whole interest of his co-tenant. If he do so, trover lies by the other. *id*
3. By marriage, the property in possession of the wife passes to the husband; and if her interest be that of a tenant in common, her husband becomes a tenant in common. *id*

4. In trover by one tenant in common against his co-tenant, where it appeared that the defendant admitted that some of the chattels were lost and destroyed; but did not say by himself; and they had before been in possession of his wife, by marriage with whom he acquired his interest; *held*, that it should be put to the jury whether there was a conversion by the defendant, and to what extent; and though he had before admitted that his co-tenant was entitled to a certain value, or to certain articles which he (the defendant) proposed to deliver; yet *held* that the judge had no right to direct a verdict for any certain sum; but the amount of damages should be put to the jury. 4 *id*

- 5 One tenant in common cannot bring an action merely for dispossessing him; for his right is not superior to that of the other. *id*

6. One tenant in common entering on, or being in possession of lands generally, shall be presumed to have entered, or taken and possessed, consistently with the common title of all: and in such case, though the possession be exclusive, the statute of limitations will not run against his co-tenant; but where, by some notorious act, he claims an exclusive right, though it be under a title which is void, yet the statute shall run from the time of such claim. *Jackson v. Tibbets.* 241

7. Thus, where a tenant in common caused a partition to be made, professing to be under the act of 1785, (1 Jones & Varick, 201,) which was void in law; yet, he having possessed in severalty under the partition for 20 years, *held*, that a co-tenant was barred his right of entry. *id*

See ADVERSE POSSESSION, 2, 8, 9, 10.

TENANT PER AUTER VIE.

See ADVERSE POSSESSION, 7.

TENDER.

A tender of money due upon a judgment does not, *per se*, discharge it, or take the lien of the judgment creditor; but may still redeem upon it as a judgment creditor, within the statute, (sess. 43, 184, s. 3.) *Law v. Jackson.*

TIME.

See INDICTMENT, 2, 3. PLEAS AND PLEADING, 19 to 24.

TRANSCRIPT.

See JUSTICE'S COURT, 1, 10, 11, 12, 1.

TRESPASS.

1. Whoever has an exclusive right in the soil as to a crop of wheat growing thereon, may maintain trespass *quare clausum* *pro* *Austin v. Sawyer.*
2. A plaintiff having a right to personal property loaned to another, for an indefinite time, may maintain trespass for taking. *Orser v. Storms.*
3. Where a father loaned two cows to daughter, which, or their young, continue in her possession 17 years, *semb.* the father might maintain trespass for taking them or their young from the possession of daughter, or daughter's husband.

See COSTS. EVIDENCE, 5. PROMISE OF DEMNITY.

TRIAL.

See ERROR, 3. NEW TRIAL. PRACTICE

TROVER.

1. To warrant trover, the plaintiff must show a present right of possession in the chattel. If it appear to have been pledged by the plaintiff's vendor, before the sale, in order to secure a debt or duty to a third person the plaintiff cannot recover, unless he show such debt or duty to have been discharged or that the operation of the pledge has ceased in some other way. *Bush v. Lyon.* 6
2. One who claims property in himself in the chattel in question, in trover, is a competent witness for the defendant to show such property, whether it be special or general.
3. The finder of a chattel has a special property in it, and may maintain trover against any one who shall convert it, except the rightful owner. *McLaughlin v. Waite.* 674

4. But the rule does not apply to the finder of a chose in action, *e. g.* a lottery ticket. 670
5. Where *M.* found one half of a lottery ticket, and gave it to *W.* and *W.* with directions to advertise it, which they did, but no owner came for it, and the ticket finally drew \$5000, which *W.* and *W.* received, *held* that they were not accountable to *M.*, the finder for one half of the prize money. *id*

See TENANT IN COMMON, 1, 2, 4.

TRUST AND TRUSTEE.

See EJECTMENT, 3, 4. USES AND TRUSTS.
MORTGAGE, 1 to 4.

U.

USES AND TRUSTS.

1. Brief historical view of uses and trusts. *PER STEBBINS, senator. McCartee v. Orphan Asylum Society.* 437
2. It has been held that a feoffment by the husband to *A.* for the use of his wife, is executed by the statute of uses, though the husband could not convey directly to his wife. *PER STEBBINS, senator.* *id*
3. On failure of a trustee, a court of equity will appoint another. *PER STEBBINS, senator.* *id*
4. The statute of uses will not execute a use upon a use. *PER STEBBINS, senator.* *id*
5. A trust shall not fail for want of a trustee, and cases showing this. *PER JONES chancellor, arguendo in support of his decree; and per STEBBINS, senator.* *id*

See WILL, 6, 7, 11, 15, 17.

USURY.

1. An agreement to pay more than legal interest for money loaned, on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the mere amount lent, with legal interest only. *Merrills v. Law.* 65
2. But if the agreement to pay more than legal interest be subsequent to the time of the loan, though such agreement be usurious, yet it will not avoid the note. *id*
3. Where *R.* was applied to by *P.* for a loan of money, but not having it, referred *P.* to his son-in-law, whose usage he said it

was to receive 7 per cent. besides legal interest, and by arrangement between himself and *P.*, received *P.*'s note with an endorser, and procured the money of his son-in-law, at the rate mentioned by him, on his own note, which he afterwards paid, and gave *P.* credit from time to time on *P.*'s successive endorsed notes, holden by *R.* himself; *held*, that *R.* must be considered the lender; that he did not stand in the light of a mere surety of *P.*, and that the notes taken by him were void. *Reed v. Smith.* 647

4. Where the original loan is usurious, all the securities therefor, however remote or often renewed, are void. *id*
5. Where one, as agent, lends money for another, at an usurious rate of interest, and afterwards pays him, and takes security from the borrower in his own name, it is void, though he derive no benefit from the loan, and the premium go to the exclusive benefit of the principal. *id*
6. It would be void even in the hands of a *bona fide* holder. *id*
7. Whether a surety, knowingly becoming bound for and paying an usurious loan, may recover over against his principal? *Quere.* *id*

See EJECTMENT, 9.

V.

VAN RENSSELAER'S, MR.

Remarks on the death and character of Mr. Heary. 783

VENDOR AND VENDEE.

1. A vendor of land has a lien upon it for the purchase money, while the land remains in the hands of the vendee, unless the circumstances show an intention not to reserve the lien. *Stafford v. Van Rensselaer.* 316
2. *Semb.* that no one can take advantage of an implied waiver of the lien by the vendor, except a *bona fide* purchaser from the vendee. *id*

See EVIDENCE 5, 6. MONEY HAD AND RECEIVED, 1, 2, 3.

VERDICT.

See ERROR, 4.

W.

WAGERS.

1. All wagers on the event of an election are illegal and void, though made after the poll of election is closed, if before the canvass is complete. *Rust v. Gott.* 169
2. The state canvass of an election is not conclusive, but may be enquired into by a court of law, on its coming collaterally in question. *id*
3. On the validity of wagers generally, and bets on elections particularly, and the moral tendency of each. (Note (a) subjoined to the case.) *id*
4. It would seem, from the reasoning of the principal case, and that referred to and quoted at large in the note, that all wagers made on the event of an election, before, during, or after the election, are illegal and voidable, at any time before the money or thing staked is paid over or delivered. *id*

WAGES.

See SEAMEN'S WAGES.

WARRANTY.

See PROMISE OF INDEMNITY, 4.

WARRANTY DEED.

See DEED, 1, 30, 31, 32, 33.

WIFE.

See HUSBAND AND WIFE. TENANT IN COMMON, 3. USES AND TRUSTS, 2.

WILL.

1. Where the execution of a will is established, there must, in order to revoke it, be some outward and visible sign of revocation, or cancelling *animo revocandi*. *Jackson v. Betts.* 208
2. If a man let his will stand till his death it is his will; otherwise not. It is ambulatory till his death. *id*
3. A man when he makes his will, may disregard the claims of his children, and will his property to a stranger, if he be so disposed. *id*
4. The situation of any of his children or grand children, as to property, and the com-

parative inadequacy or inequality of a provision for them in his will, are inadmissible to show an express or implied revocation. 208

5. If a will be once duly executed, and once an existing will in the hands of the testator, unless there be evidence of its having been cancelled or otherwise revoked by the testator, the law presumes its continued existence to the time of his death. *id*
6. *J.* being seized of real estate, devised that if, at his death, he should have a child living, the rents and profits should be received by his executors, and applied for the support, &c. of the child, the surplus to be invested in stock, to accumulate and be paid over to the child at 21, or marriage. He gave all the residue of his real and personal estate, after payment of all legacies and other bequests, to a corporate company, (*The Orphan Asylum Society, in the city of New York,*) the bequest to take effect immediately after debts and legacies paid, if he should leave no child, or, if he should leave a child, then, upon the child's death, intermarriage, or attaining 21. The will then gave to his executors all his real estate, subject to the trusts aforesaid; and declared his will to be, that when such child should attain 21, or marry, his real estate should be sold by his executors, and one half of the proceeds paid to the child, if it should attain 21, or marry. The testator died seized, and a posthumous child was born to him, which died before 21, and unmarried. *Held*, that the devise to the corporation was *direct* on the death of the child, and not a *trust* for the corporation; and so the will was, in this respect, void as to the real estate within the statute of wills, (sess. 36, ch. 23, s. 1. 1 R. L. 364.) *M'Cartee v. Orphan Asylum So.* 437
7. Otherwise, it seems, had there been a trust; insisted on at large in the dissenting opinion of STEBBINS, senator, and supported by JONES, chancellor, *arguendo* for his decree. *id*
8. The act incorporating the company, (sess. 30, ch. 179) authorized them to take by purchase, (§ 1.) *Held*, that the term *purchase* should be taken in its popular, and not in its broadest legal sense, so as to include a devise. *id*
9. Dissenting view of this question. Per CARY, senator. *id*
10. The right to devise existed at common law. Per CARY, senator; STEBBINS, senator, contra; and that it depends on statute. *id*

11. The words *rents and profits*, in the statute of wills, do not include a *use*. Per STEBBINS, senator. 437
12. The statute of wills is an enabling, not a prohibitory statute. Per STEBBINS, senator. *id*
13. The reason why devises to corporations were excepted in the statute of wills. Per STEBBINS, senator. *id*
14. Difference between an incapacity to devise, and a prohibition to take. Per STEBBINS, senator. *id*
15. Incapacity to devise *land* will not prevent the devise of a *use*. Per STEBBINS, senator. *id*
16. The English statute of charitable devises, of devises in mortmain or of wills, or devises to corporations; and the common law, and the rules of the English chancery on these subjects, independent of statutes; and a comparison between the English and New York statute law on these subjects, and a very full review and history of the cases on the same subjects, both English and American. Per JONES, chancellor, *assigning reasons for his decree*. *id*
17. Though a devise directly to a corporation may be void by the statute of wills, (1 R. L. 364,) yet a devise to a natural person, in trust for a corporation, is good. Resolved by the chancellor, and not questioned by the court of errors. Vid. JONES, chancellor's, *argument in support of his decree*; and the view of this question by STEBBINS, senator. *id*
18. Extent of the word *purchase*. It includes devise. Per JONES, chancellor, *arguendo in support of his decree, and the cases cited by him*; and per WOODWORTH, J., *delivering the opinion of the court of errors*; and per CARY, senator. *id*

See EVIDENCE, 38, 39, 42, 43.

WITNESS.

1. It is the nature of the crime, not the punishment, which determines whether a convict is an admissible witness. People v. Whipple. 707

2. A conviction of treason, felony or any species of the *crimen falsi*, render the convict incompetent to testify. 707

3. But to render him incompetent, the judgment as well as the conviction must be proved. *id*

4. The principal is a competent witness against the accessory. *id*

5. So an accomplice is admissible as a witness against his co-partners in the crime. *id*

6. But an accomplice is admissible or not in the discretion of the court; and when admitted, on his making a full disclosure, is entitled to a recommendation for pardon. *id*

7. A motion should be made for the admission of an accomplice to testify, by the public prosecutor: and the court, under the circumstances of the case, will admit or disallow the evidence, as may most effectually answer the purposes of justice. *id*

8. *Semb.* what an accomplice states under oath against his associate would be inadmissible evidence against himself, on account of the implied promise of the court to recommend him to mercy. *id*

9. Where one was convicted by verdict of murder, and offered as a witness against an accessory before the fact, but appeared to have been the leader in perpetrating the crime, he was rejected. *id*

10. An accomplice admitted to testify of one crime, may, though he behave well, be prosecuted for another crime, the implied promise of pardon not extending to that. And if it appear that he is charged with any other felony than that in relation to which the prosecutor moves for his admission as a witness, this fact of itself will be a sufficient ground for rejecting him. (See note (a) at the end of this case.) *id*

See EVIDENCE, 7, 9, 10, 13, 15, 21, 22, 24, 25, 26, 27, 33. MORTGAGE, 5. PARTNERS AND PARTNERSHIP, 3, 4.

WRIT OF ERROR.

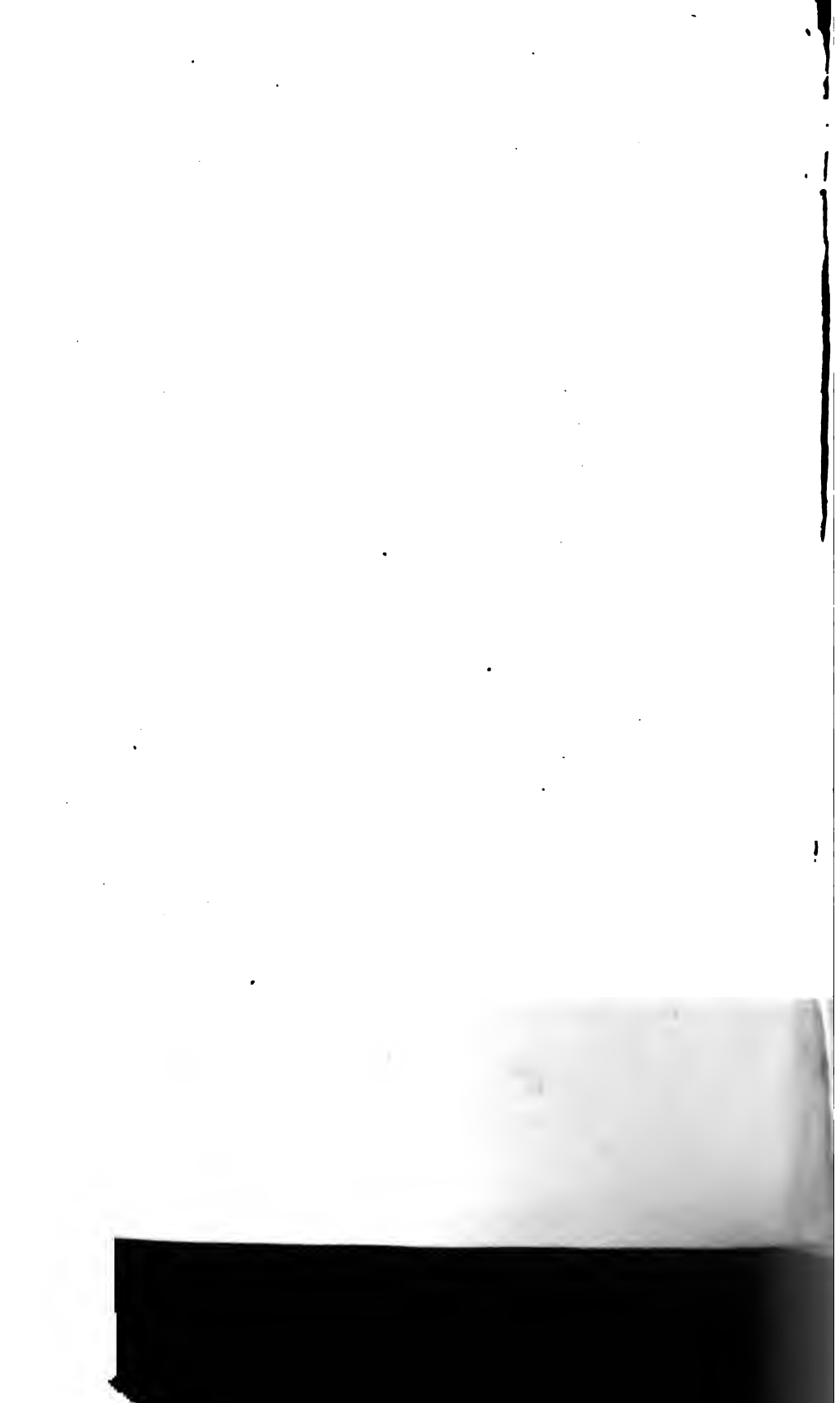
See AMENDMENT. ERROR, 4, 2

END OF VOLUME IX.

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